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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 464

HARRY M. ELDER, M.D.,
Petitioner,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District, Division One

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No.

HARRY M. ELDER, M.D.,
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vs.
BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District, Division One

Petitioner by his counsel prays that a writ of certiorari issue to review the decision of the District Court of Appeal, State of California, First Appellate District, Division One, which decision reversed the judgment of the Superior Court of the State of Cali-

fornia, in and for the City and County of San Francisco. A petition for hearing by the Supreme Court of the State of California was timely made and the aforesaid petition for hearing was denied by an order of the Supreme Court of the State of California rendered May 25, 1966.

OPINIONS BELOW

The opinion of the Board of Medical Examiners of the State of California is appended hereto and marked Appendix 1. The judgment of the Superior Court of the State of California, in and for the City and County of San Francisco, reversing the aforesaid decision of the Board of Medical Examiners of the State of California is appended hereto and marked Appendix 2. The opinion of the District Court of Appeal of the State of California, First Appellate District, Division One, reversing the aforesaid judgment of the Superior Court of the State of California, in and for the City and County of San Francisco, is appended hereto and marked Appendix 3.

The petition for hearing filed with the Supreme Court of the State of California is included in the record presented herewith and the portion hereof indicating the presentation of the federal questions is appended hereto marked Appendix 4. Said portions of the record are identified as Pages 4, 5, 6 and 7 of the aforesaid petition for hearing directed to the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the terms and provisions of 28 U.S.C.A. Section 1257, Subdivision 3, and it is asserted that the petitioner's constitutional safeguards reflected in the Fourth, Fifth and Fourteenth Amendments to the United States Constitution have been violated resulting in the deprivation of property without due process of law and the denial of procedural due process of law.

QUESTIONS PRESENTED

1. Whether the arrest of a nurse on a warrant for her arrest rendered lawful the search and seizure of the confidential records of her employer doctor where there has been no search warrant issued therefor and where the sole purpose of the warrant of arrest of the nurse was to search and seize the confidential records of the doctor.

2. Whether the District Court of Appeal erred in holding that the evidence admitted was not the "tainted fruit" of the documents illegally seized.

3. Whether the District Court of Appeal erred in holding that the admission of the evidence illegally obtained was not prejudicial to petitioner.

4. Whether the exclusionary rule is applicable to administrative proceedings.

STATEMENT OF THE CASE

Petitioner, a duly licensed doctor of medicine for a period of 37 years, administered methedrine to former narcotic addicts in a manifestation of professional humanity incident to a studied program of care. Respondent objected to this conduct and insisted that former drug addicts surrender to the authorities for commitment to state institutions.

Petitioner attended a medical conference in Rio de Janeiro, which fact was known by respondent. During his absence respondent obtained a warrant for the arrest of the nurse of the petitioner predicated upon charges of prescribing for an ailment, etc. without having a certificate so to do. Incident to arresting the aforesaid nurse respondent, without obtaining a search warrant, searched the offices of petitioner, confiscated all of his records relative to his practice (as distinguished from records specifically relating to the charges against the nurse) and refused to permit the nurse the use of a telephone for the purpose of telephoning counsel. At the trial of the nurse and subsequent to adducing all evidence relative to the alleged offense the trial Court rendered a judgment of dismissal of all charges.

Subsequent to the aforesaid illegal search and seizure of medical records owned by petitioner respondent instituted administrative proceedings against petitioner herein for the purpose of suspension or revocation of license. The evidence adduced at the administrative hearing was based upon the records

illegally seized. At the conclusion of the hearing the decision of the Board was that the license of petitioner be revoked.

Thereafter incident to appropriate procedures the administrative proceedings were carefully reviewed by the Superior Court of the State of California, in and for the City and County of San Francisco. Subsequent to a thorough review of all pertinent evidence the trial Court concluded that there had been an illegal search and seizure in violation of the constitutional safeguards afforded respondent and others and decreed that if the revocation of petitioner's license to practice medicine were predicated upon evidence directly or indirectly obtained as the result of the illegal search and seizure proceedings as aforesaid, the license must be restored. The trial Court determined that the obvious purpose of the arrest of the nurse was to search for and seize the doctor's records. The trial Court remanded the case to the administrative tribunal for the purpose of determining what, if any, legally obtained evidence was considered in the determination of revocation of license. Respondent appealed from the judgment in order to stay the remand and the District Court of Appeal of the State of California tried the case de novo, and in violation of its constitutional function reversed the trial Court and decreed that the license must be revoked. Petitioner petitioned the Supreme Court of the State of California for a hearing which was denied. Immediately upon the denial of the petition for a hearing a stay was granted permitting the submission of this case

to the Supreme Court of the United States for decision relative to the granting of a writ of certiorari and such other and further proceedings as by this Honorable Court might be appropriate.

All constitutional issues were raised in the proceedings below as are indicated in the record presented herewith.

ARGUMENT

I

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE SEARCH AND SEIZURE OF THE CONFIDENTIAL RECORDS OF DR. ELDER'S PATIENTS WAS A LAWFUL "INCIDENT" OF THE ARREST OF HIS NURSE.

A. A Search and Seizure Is Unreasonable Where the Arrest Upon Which It Is Based Is a Mere Pretext for Searching the Premises.

In the hearing on Dr. Elder's Petition for Writ of Mandate the Superior Court concluded that the purpose of the arrest of Dr. Elder's nurse was to gain access to petitioner's records. The trial judge said:

> "I am convinced that the records that they seized at the time—those records at the time they went in and arrested the nurse, it was an illegal search, the fact that they arrested the nurse, and incidental to her arrest, picked up all these records. . . . *It is obvious they were looking for the doctor's records.* . . . And you have to look at the intent of the parties. So I hold the search illegal. . . ." [R.T. 54:23-55:6; emphasis added.]
>
> [241 ACA at 358; 50 Cal. Rptr. at 314-316.]

The District Court of Appeal, although concurring with the trial Court's observation that the arrest was

motivated by an intent to seize the doctor's records, nevertheless rejected this crucial element of the case on the erroneous supposition that as long as there was a "valid" arrest of the doctor's employee, a search and seizure of *all* of the office records was permissible as "incidental" to the arrest. The appellate Court said:

> "It may be obvious that they were looking for the doctor's records, but it does not follow that the search was illegal on that account if it was supported by a valid arrest." [241 A.C.A. at 358, 50 Cal. Rptr. at 316.]

The foregoing statement is diametrically opposed to the established law of the land. A survey of the decisions of this Court and of the lower federal courts clearly shows that "(a)n arrest may not be used as a pretext to search for evidence" [*United States v. Lefkowitz*, 285 U.S. 452 (1885)].

For example, in *Lustig v. United States*, 338 U.S. 74 (1948), a case in which local police secured arrest warrants against suspected counterfeiters for failure to register under a criminal-registration ordinance, the admitted purpose of the warrants was to "get into that room to find out what was in there" [338 U.S. at 76]. The Court, per Justice Frankfurter, held that under these circumstances the search was unlawful and its fruit inadmissible in a federal prosecution.[1]

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[1]The above was apparently an alternative holding, in view of the fact that the search preceded the arrest of defendants, who were absent from the room at the time the police entered by means of a passkey.

This principle—that an arrest warrant may not be used as a mere vehicle for a search—was again restated by Justice Frankfurter in *Abel v. United States,* 362 U.S. 217 (1959). Immigration officials, accompanied by F.B.I. agents, arrested defendant on an administrative warrant as a preliminary to deportation, and during a search of the room by the immigration officials for evidence of "alienage," discovered evidence of espionage which led to his conviction. The Court rejected defendant's claim that the government used the administrative arrest warrant for the illegitimate purpose of obtaining evidence of espionage, since the trial Court had found that there was no bad faith on the part of the F.B.I. Justice Frankfurter, nevertheless, went on to say that:

> "Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts."[2]

The foregoing dictum in *Abel* concerned the collusive use of an administrative warrant (which is issued not by a magistrate, but by the Immigration and Naturalization Department). Nevertheless the principle set forth therein, that the courts must resist the misuse of governmental authority, would apply to the instant case, in which an arrest warrant was secured for the ulterior purpose of searching the

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[2]See also *Maryland v. Pettiford,* Supreme Bench of Baltimore City (1959) quoted in dissenting opinion of Justice Douglas.

private records of another—records that otherwise would be immune from governmental prying since no basis existed under the Fourth Amendment for a warrant to search the doctor's records.

In *Jones v. United States,* 357 U.S. 493 (1958), a conviction based on evidence secured by federal officers who forced their way into a house and seized distilling equipment was reversed, even though the officers had probable cause to believe liquor was illegally possessed. The Court stated as a ground of reversal that the testimony of the officers made it clear "that their purpose in entering was to search for distilling equipment, not to arrest petitioner."[3] [357 U.S. at 499.]

The rule of the above cases is applicable even though the search and seizure follows the execution of a valid arrest warrant. (See *United States v. Lefkowitz,* supra, 285 U.S. 452, 458, 467.) In *McKnight v. United States,* 183 F.2d 977 (1950), officers, armed with an arrest warrant, refrained from arresting defendant in the street but waited until he entered a house which they wanted to search for the purpose of discovering items connecting defendant with the "numbers game" as charged in the complaint. The Court, reversing a conviction, cited the *Lefkowitz* case, supra, and said (at p. 978):

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[3]Although this case is also technically distinguishable on the ground that there was no initial arrest preceding the search, the motive of the officers—not mere mechanics—was the controlling factor in the case. Moreover, as to *Dr. Elder,* the purpose was not to arrest him, but to search his records, as in the *Jones* case.

> "It is settled law that 'when it appears, as it does here, that the search and not the arrest was the real object of the officers in entering upon the premises, and that the arrest was a pretext for or at the most an incident of the search,' the search is not reasonable within the meaning of the Constitution." Citing *Henderson v. United States*, 12 F.2d 528, 531, 51 ALR 420 (4th Cir. 1926).

And in *United States v. Alberti*, 120 F. Supp. 171 (U.S.D.C., S.D., N.Y., 1954), where agents misrepresented to defendant that they wanted to discuss a confidential matter with him, the Court held that a search of the premises was unreasonable since the agents did not execute their arrest warrant until after they were invited inside defendant's apartment:

> "(W)hen the warrant of arrest is deliberately used as a substitute for a search warrant, as it was here; where a man is lured to his apartment on false pretenses so that the technical arrest may take place there for the purpose of making the search an incident of the arrest, I cannot so ignore the realities of the situation as to call such a search a reasonable incident of the arrest." (120 F. Supp. at 173.)

Although the *Alberti* case is distinguishable on its facts, the basis of the reversal is identical with the principle enunciated in the preceding cases: namely, that an arrest, although valid, cannot be utilized for the purpose of conducting an otherwise impermissible search and seizure.

In *Taylor v. United States*, 286 U.S. 1 (1932), the Court held that evidence of illegal liquor should have been suppressed where prohibition-enforcement officers, acting upon complaints received by them, broke into a garage adjacent to defendant's residence, seized contraband liquor, and arrested defendant when he came out of his house to investigate the commotion. The officers had neither an arrest nor a search warrant. The Court said:

> "No offender was in the garage; the action of the agents had no immediate connection with an arrest. *The purpose was to secure evidence to support some future arrest.*" (286 U.S. at 6; emphasis added.)

The *Taylor* case is superficially distinguishable on the ground that the search of the records of petitioner herein was supported by an arrest warrant. This approach, which was taken by the District Court of Appeal, fails to recognize that the issues in this case are dependent upon whether one views the facts from the standpoint of the doctor or of his nurse. The appellate court looked at the case only from the perspective of the nurse, who, of course, was arrested under authority of a warrant. But when the case is viewed with respect to the facts relevant to the *doctor's* appeal, it is clear that the rule of law relied upon below is not applicable. The determinative fact is not the arrest of the nurse, but that she was arrested for the purpose of searching petitioner's records. Under the rationale of the cases discussed above, the State cannot justify the search by relating

it back to the arrest. Therefore, when seen in this context, the facts in the case at bar are identical with the *Taylor* case: a search without an arrest was made for the sole purpose of securing evidence for a future accusation.

B. The Search and Seizure of Dr. Elder's Records Was Not Reasonably Related to the Arrest of His Employee.

The District Court of Appeal believed that the seizure of Dr. Elder's records was a lawful incident of the arrest of his nurse since "he left her in control of his office and instructed her to use the records in connection with the activities for which she was arrested." (241 A.C.A. at 361; 50 Cal. Rptr. at 317.) The Court, however, confuses the crime for which the nurse was arrested (prescribing for an ailment without a certificate to practice medicine) with the accusation lodged against the doctor (administering "dangerous drugs" to addicts).

Former Section 4229 of the California Business and Professions Code at all relevant times provided that:

> "No prescription for any dangerous drug may be refilled except upon authorization of the prescriber which may be given orally or at the time of giving the original prescription." (Cited by the Court at 241 A.C.A. 360, 50 Cal. Rptr. at 317.)

Although the Court states that the practice of the nurse of refilling prescriptions in petitioner's absence was of "questionable legality" [241 A.C.A. at 360, 50 Cal. Rptr. 317], this casual conclusion is itself questionable. A reasonable interpretation of the general

language employed by the legislature is that a doctor may lawfully authorize his nurse to order a refilling of a prescription—and such was the construction given by the Municipal Court in the trial of the nurse [241 A.C.A. at 360, 50 Cal. Rptr. at 317]. In the instant case it would appear that the issuance of the arrest warrant resulted from the failure to differentiate properly between two simple concepts: "prescribing for an ailment" and "refilling a prescription". That refilling a prescription should be identical with prescribing for an ailment is a startling novelty which could open the way to prosecution of nurses and mass seizure of patients' confidential records throughout the state.

In arresting Dr. Elder's nurse for "prescribing" for an ailment there may have been some basis for contending that a search limited *only* to the nurse's private records would be lawful, on the assumption that she had been practicing medicine on the side (which of course she was *not* doing). *But the officers searched and seized the records of the doctor,* who definitely was authorized by law to prescribe medicine. The seizure of the *doctor's records* was upheld on the ground that the nurse, as his authorized agent, was entrusted with possession and control of the "records in connection with the activities for which she was arrested" [241 A.C.A. at 361, 50 Cal. Rptr. at 317.] Yet no "crime" was charged against the doctor which could be the basis of a search of *his* records. Obviously, if the nurse was the doctor's authorized agent and acting under his instructions,

the officers could not reasonably believe that her telephone conversations with a pharmacist, relating to the refill of prescriptions for *patients of Dr. Elder,* was a violation of the law. Indeed, if the nurse had been guilty of the crime of prescribing for an ailment without a license, she must have been acting in her own capacity and not as the petitioner's authorized agent. In other words, the agency argument runs into itself. The District Court of Appeal, by justifying the search of Dr. Elder's records on the ground that the nurse was his agent, is in effect conceding that there was no probable cause for her arrest; yet on the other hand, if the arrest were justified, there would be no reasonable grounds for searching the Doctor's records since he in no way could be implicated in the so-called crime charged against his nurse. Thus the search and seizure of petitioner's records was not a reasonable incident of the arrest of the nurse.[4]

The District Court of Appeal, by its unfortunate reliance on an agency theory, has greatly attenuated the safeguards of the Fourth Amendment. As pointed out by Judge Karesh, who heard the case in the Superior Court, if officers may ransack an employer's office and files as an incident to the arrest of his employee, great mischief is in store. (See R.T. 4:1-11; 5:3-6.) With this case as precedent, authorities have merely to arrest an attorney's secretary for unauthor-

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[4]See also *Stoner v. California,* 376 U.S. 483 (1964): "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority'."

ized practice of law in order to seize all the confidential files in his office. No records will be safe if an employer is unfortunate enough to have in his employ one who is an occasional misdemeanant. For example, an employee who makes book on the side for fellow employees, or who conducts an inter-office lottery or sells sweepstake tickets (and these are hardly uncommon!) will afford the police unlimited opportunity to search and haul away a company's private records. If such is to be the law in California, moving vans may soon become standard police equipment.

C. The Search and Seizure of All of the Petitioner's Files and Confidential Records Constituted a General, Exploratory Search Which Is Condemned by the Fourth Amendment.

Closely related to the question of whether the search and seizure was reasonably incident to the arrest is the issue of whether, under the circumstances, the conduct of the police constituted an unlawful exploratory search. "The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant; a search or seizure without a warrant as an incident to lawful arrest has always been considered to be a strictly limited right, growing out of the inherent necessities of the situation at the time of the arrest." [4 L.Ed.2d 1984 (annotation).]

In *United States v. Lefkowitz,* 285 U.S. 452 (1932), the Court condemned a search which arose out of a federal raid on an illegal liquor business. The officers did not limit themselves to seizure of items plainly visible (cf. *Marron v. United States,* 275 U.S. 192), but made a thorough search of desks, cabinets, and a

wastebasket. A similar search was condemned in *Go-Bart Importing Co. v. United States,* 282 U.S. 344 (1931), in which an office desk, safe and filing cases were ransacked in a general search of petitioner's office. And in *Kremen v. United States,* 353 U.S. 346 (1956) federal officers, who executed an arrest warrant against fugitives from justice hiding in a mountain cabin, violated the Fourth Amendment by seizing the *entire* contents of the cabin and removing them 200 miles to San Francisco for examination. The Court said (at pp. 347-348):

> "(T)he introduction against each of petitioners [including the owner of the cabin] *of some items* seized in the house in the manner aforesaid rendered the guilty verdict illegal." (Emphasis added.)

The instant case of course is not as extreme as the facts presented in *Kremen,* where the agents stripped the cabin bare. The two situations, however, are comparable in that the State authorities did strip Dr. Elder's office of *all* his records [R.T. 2:25-3:5; C.T. 88:25-89:2 (Finding of Fact No. VI)] in the obvious expectation that they *might* contain evidence for the case being built against him. Likewise, the State officials (as in *Kremen*) carted the records away for a later and more leisurely examination.

Undoubtedly, such cases as *Harris v. United States,* 331 U.S. 145 (1946) and *Rabinowitz v. United States,* 339 U.S. 56 (1949) appear to allow greater permissive limits upon searches incidental to lawful arrests than do *Go-Bart* and *Lefkowitz.* (See discussion in *Abel v.*

United States, 362 U.S. 217, 235.) In both *Harris* and *Rabinowitz,* however, the officers were looking for items *specifically connected with the crime charged against defendants,* but found other items of contraband which were not the object of the search. Seizure was justified, since "[a] crime was thus being committed in the very presence of agents conducting the search". [*Harris v. United States,* supra, 331 U.S. at 155 (illegal draft cards).] Moreover, the trial judge in the *Harris* case impliedly found that the agents conducted the search of defendant's house in *good faith* for the purpose of discovering instruments of the crime. [331 U.S. at 153.] Thus *Harris* and *Rabinowitz* do not permit general, exploratory searches. Under the Fourth Amendment, officers who execute a valid arrest warrant may conduct a search of the premises only "for the purpose of finding such items" as are related to the alleged crime. [*Abel v. United States,* 362 U.S. 217, 238 (1959) (dictum); see also *Preston v. United States,* 376 U.S. 364, 368 (1963) (dictum).]

In the case at bar the fact that the police took all of Dr. Elder's records makes a mockery out of the contention that they were merely looking for items related to the nurse's alleged misdemeanor of "prescribing" for an ailment. Furthermore, assuming that the records of methedrine patients were "contraband" and therefore within the *Harris* and *Rabinowitz* rule, such fact would not justify the seizure of *all other records.* Thus the search and seizure was obviously exploratory.

But in fact, the records of the methedrine patients could not possibly have been considered contraband, in the sense that possession of unauthorized draft cards in *Harris,* or of postage stamps with forged "overprints" in *Rabinowitz,* was unlawful. To constitute a violation of law, it is necessary to show that the patient was an addict being treated for addiction [Health and Safety Code sections 11391 and 11716] an element which involves difficult questions of fact.[5] Thus possession of the records did not show that a "crime was being committed in the presence of the officers."

Not only was possession of the records *not* a violation of the law, but neither could they be seized on the ground that they were "instruments of crime," despite a contrary inference by the District Court of Appeal. (241 A.C.A. at 362, 50 Cal. Rptr. at 318.) The Appellate Court implied that the records herein were similar to those in *People v. Thayer,* 63 Cal. 2d 635 (1965) in which a doctor, charged with fraudulent billing practices, placed wavy lines on the records of his patients to indicate that false billings were to be made. The files of Dr. Elder, which merely record the history of the patient and the prescriptions authorized by him, cannot fall into the category of an "instrument of crime."

The District Court of Appeal next held, at least by implication, that the records could properly be seized (even if they were not "contraband" or "instruments

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[5]See definition of "addiction" in *People v. O'Neil,* 62 Cal. 2d 748, 754 (1965), discussed *infra.*

of crime") on the ground that the California Supreme Court in *People v. Thayer,* 63 Cal. 2d 635 (1965) had rejected the line of federal cases holding that "mere evidence" cannot be the subject of a seizure [see, e.g., *Boyd v. United States,* 116 U.S. 616, 623-624 (1886); *Gouled v. United States,* 255 U.S. 298, 309 (1921)]. Yet, even, so, since the only "crime" alleged at the time of the seizure was that of "prescribing" without a license, it is difficult to understand how the records would be evidence against the nurse; in fact, the records would tend to *exonerate* the nurse by showing that it was Dr. Elder who prescribed for the "ailments" therein.

Moreover, even if California may properly relax the standards heretofore established by this Court, and allow the seizure of "mere evidence" tending to show the commission of the crime by the particular defendant who has been arrested, it is a far different matter to hold that police may seize personal records which *might in the future* be used as evidence against another person who has not yet been charged with any crime. A realistic consideration of the facts of this case can only show that the search and seizure was exploratory for the sole purpose of bringing subsequent charges against Dr. Elder.

D. Assuming But Not Admitting That State Officials Had a Right to Search Dr. Elder's Files as an Incident to the Arrest of His Nurse, the Subsequent Seizure of All of His Records Was Unlawful.

The arresting officers both *searched* and *seized* Dr. Elder's records. It should be stressed, that "[t]he

things here forbidden [by the Fourth Amendment] are two—searches and seizures" [*Boyd v. United States,* 116 U.S. 616, 641, concurring opinion]. Assuming, arguendo, that the arrest of the nurse was not a pretext for a search, and further assuming, but certainly not admitting, that a search of all of the doctor's confidential records was a reasonable incident to the arrest of an employee, the question still remains as to whether the mass *seizure* of all the doctor's records was reasonable. In other words,

> "It is important to keep clear the distinction between prohibited searches on the one hand and improper seizures on the other. . . . Thus, it is unconstitutional to seize a person's private papers, though the search in which they were recovered was perfectly proper" [*Harris v. United States,* 331 U.S. 145, 165-166, Frankfurter, J., dissenting, quoting *Davis v. United States,* 328 U.S. 582, 612-613 (dissenting opinion)].

Under no circumstances can one justify the removal of all of Dr. Elder's files for an alleged crime in which he was in no way implicated, nor which, because of his licensed status, could he ever be accused of committing. Many files were those of Dr. Elder's patients who were not connected with the methedrine charges subsequently lodged, yet these records were seized along with the others. These files, together with those of the alleged addicts, were subjected to scrutiny and evaluation by agents of the State [241 A.C.A. at 359], and their confidentiality breached. This arbitrary action, moreover, was unnecessary. Because the nurse's telephone calls were monitored [241 A.C.A. at

359], the agents already knew the names of patients for whom the nurse allegedly "prescribed" without a license. Furthermore, they testified that the nurse cooperated with them by pointing out the files of the "methedrine" patients [241 A.C.A. at 359, 50 Cal. Rptr. at 316]. The nurse denied this statement; nevertheless, under the agents' own version of the facts they would have had little problem in searching out—and seizing—only those files allegedly relating to her arrest.

It is clear that the seizure (as opposed to the search) of every single file in the doctor's office was unnecessary and unreasonable under any set of circumstances, but especially so in view of the fact that a reasonable alternative was available to the agents, that is, to limit the seizure to those records involved in the charge against the nurse.

It is regrettable that this practice by State officials of exploratory search and seizure should occur in California—or elsewhere. It is even more unfortunate that the practice has now been given judicial approval, especially since the opinion indicates that the Court did not adequately focus on the precise issues raised herein, or fully consider the consequences of its holding. The Court took a black-letter rule of law —i.e. that a search incident to arrest is lawful—and applied it indiscriminately to the unusual factual situation here involved. Because of the dangerous nature of this precedent, as heretofore discussed, it is respectfully submitted that the petition for certiorari herein should be granted.

II

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT PETITIONER FAILED TO SHOW THAT THE EVIDENCE ADMITTED WAS THE "FRUIT" OF THE DOCUMENTS WHICH HAD BEEN SEIZED.

In the hearing on the petition for mandate, the trial Court stated that if the records had in fact been illegally seized, the determinative question was whether the names of patients appearing in the accusation were obtained as a result of the unlawful search and seizure, or whether they had been independently obtained by a search of pharmacy records [241 A.C.A. at 364, 50 Cal. Rptr. at 319].

The Attorney General, however, conceded that "The record doesn't show" how the names of Dr. Elder's patients were secured [R.T. 17:5-14, 18:22-19:1, 241 A.C.A. at 364, 50 Cal. Rptr. at 319]. Moreover, the record affirmatively shows that Mr. Smith, the investigator for the Department of Professional and Vocational Standards, who arrested the nurse and seized Dr. Elder's records, "went through", "initialed", and "read" all of the confiscated records of the methedrine patients [241 A.C.A. at 364, 50 Cal. Rptr. at 319, R.T. 17:18-18:5].

Despite this obvious connection between the seizure of petitioner's records and the subsequent filing of an accusation containing the names of each and every methedrine patient listed in said records, the District Court of Appeal rejected the trial Court's finding of fact No. VII [C.T. 89] that "the evidence presented by Respondent Board was produced and obtained as a result of the unlawful search and seizure of peti-

tioner's records." The grounds for this rejection were: (1) "absence of an attempt to prove 'that a substantial portion of the case . . . was a fruit of the poisonous tree' "; (2) petitioner did not timely object to the introduction of the evidence; (3) the evidence was available from an "independent" source, i.e., the prescription records of the pharmacists [241 A.C.A. at 367, 50 Cal. Rptr. at 321]. For the reasons discussed below, these contentions are unsupportable.

A. Petitioner, Having Shown an Illegal Search and Seizure, Did Not Have the Burden of Showing That the Names of the Patients Listed in the Accusation Were the Fruits of the Poisonous Tree.

The appellate Court relied on the following language in *Nardone v. United States,* 308 U.S. 338 (1939) in support of its holding that petitioner herein had the burden of proving that the case against him was the fruit of the poisonous tree:

> "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin . . ." [quoted in 241 A.C.A. at 366, 50 Cal. Rptr. at 320-321].

Nardone involved the admissibility of evidence which had become accessible to the government

through the use of unlawfully intercepted telephone messages. This Court reversed a conviction on the ground that the trial Court had improperly refused to allow the accused to examine the prosecution regarding the use to which it had put the information illegally obtained by the wiretap. The language quoted above, therefore, is not a holding, and, as stated by Judge Learned Hand in *United States v. Goldstein,* 120 F.2d 485, 488 (2d Cir. 1941), "did not actually decide the question."

An important distinction is that the information heard over the telephone in the *Nardone* case *was not the same evidence introduced at trial.* Unlike the instant case, there was no self-evident link between the unlawful activity of the officials and the evidence secured against the accused. *Nardone* merely states the obvious fact that proof of wiretapping does not in itself show that a "substantial portion" of the govment's case was derived thereby.

On the other hand, the names appearing in petitioner's records seized by the police, and the names appearing in the accusation against petitioner (which names were the basis for the testimony of respondent's witnesses) were *exactly the same.* It is clear that this evidence was not the "fruit" of the search, but the poisonous tree itself.

Moreover, the interpretation ascribed by the District Court of Appeal to the *Nardone* decision has not been uncritically accepted by this Court. In *Goldstein v. United States,* 316 U.S. 114, Justice Murphy, joined by Justice Frankfurter and the Chief Justice, said in a dissenting opinion:

> "(A)fter an accused sustains the initial burden, imposed by Nardone v. United States . . ., of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the government to convince the trial judge that its proof had an independent origin." (144 U.S. at 124, N. 1)[6]

To hold that petitioner, under the circumstances of the case, must nonetheless go forward with an additional showing to connect up the names introduced as evidence by the State with the identical names appearing in the records confiscated by the State, would be unrealistic and unfair. Furthermore, the showing purportedly required by the second element of the *Nardone* test was in fact made. After the facts of the search and seizure were shown, the State investigator testified that:

> ". . . on the following day and for some time on a couple of occasions during the following week he had occasion to go through the cards that were contained in the metal filing cabinet; that he initialed most, if not all of the records subsequent to the time they were picked up; and that he read all of them that related to people who were using Methedrine" [241 A.C.A. at 359, 50 Cal. Rptr. at 316].

The clear inference from this testimony is that a "substantial portion" of the case against Dr. Elder

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[6]The majority in Goldstein held that the applicable federal statute protects only the sender of a message and therefore could not be raised by defendants who were not parties to the conversations. Thus the point mentioned by Justice Murphy was not passed on by the full Court.

was derived from the records unlawfully seized. At this point the burden shifted to the State "to convince the trial Court that its proof had an independent origin" [308 U.S. at 341]. Since the State failed to show that the information was obtained independent of the illegal search and seizure (as conceded by the Attorney General), it must be concluded that the evidence herein was tainted with illegality, as indeed was held by the trial judge.

It should also be noted (as discussed below) that during the examination of the State's first witness the hearing officer ruled that the exclusionary rule is not applicable to "administrative" hearings [241 A.C.A. at 363, 348-349; 50 Cal. Rptr. at 318, 310]. Therefore any further attempt by the petitioner to carry his so-called burden of proof would have been futile.

B. Petitioner's Objection to the Introduction of Evidence Was Timely.

The District Court of Appeal states that petitioner's "general objection" was not timely since not made until all of the evidence, other than the testimony of petitioner himself, had been adduced [241 A.C.A. at 367, 50 Cal. Rptr. at 321]. Yet, the Court elsewhere states that "The first suggestion of unlawful search or seizure was made in the course of the original argument on privilege as an objection to reference to or the admission in evidence of petitioner's patient record cards" [241 A.C.A. at 363, 50 Cal. Rptr. at 318]. This objection was made with respect to testimony by the nurse, who was called by the attorney

for the State *as his first witness* [241 A.C.A. at 348-349, 50 Cal. Rptr. at 310]. It is difficult to see how the objection could have been more timely. The parties were thereupon put on notice that one of the key elements of petitioner's defense was the unlawful search and seizure. The fact that the objection could have been "more articulately" expressed [see 241 A.C.A. at 357, 50 Cal. Rptr. at 315], is hardly a basis for denying a substantive right. Moreover, an objection, once having been made, need not be continuously renewed during the remainder of the proceeding.[7]

The District Court of Appeal also refers to the fact that petitioner stipulated that the pharmacists would testify to the prescriptions given those named in the accusation, without reserving his objection [241 A.C.A. at 367, 50 Cal. Rptr. at 321]. As heretofore discussed, the objection had already been made by counsel and was overruled by the hearing officer. (There is, moreover, nothing in the stipulation to show that the patients were addicted at the time the prescriptions were sold.)

C. The State Failed to Show That It Obtained the Evidence Against Petitioner From an Independent Source.

As heretofore discussed, the burden was on the State to show that it had obtained the names of petitioner's patients from an independent source that was not

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[7]See *Green v. Southern Pac. Co.*, 122 Cal. 563, 565, 55 Pac. 577 (1898): "Where a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising at each examination of other witnesses; and his silence will not bar him from having the exception reviewed."

tainted by the illegal search and seizure. The District Court of Appeal assumed that information concerning the methedrine users was available from the prescription records of the pharmacists. While this fact may be true, nevertheless as a practical matter, unless the names were known to the state in the first place, it would be a burdensome—if not impossible—task for the State to obtain information concerning Dr. Elder's patients from pharmacists located throughout the Northern California Bay Area. Obviously, it would be much simpler for the State agents, once in possession of the names taken from the illegally-seized records, merely to request pharmacists to advise them if their records showed that methedrine had been sold to named individuals pursuant to a prescription written by Dr. Elder. With the advent of I.B.M., it may be that the State has a central indexing system wherein all such information might be readily obtained—but if so, the State has failed to show this fact.

III

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT ERRONEOUS ADMISSION OF THE EVIDENCE OBTAINED BY UNLAWFUL SEARCH AND SEIZURE DID NOT REQUIRE A REVERSAL.

Under California law, the Superior Court may exercise its independent judgment on the evidence and set aside the Order of the Board of Medical Examiners if the findings are not supported by the weight of the evidence [Code Civ. Proc. §1094.5, Subd. (c);

see *Magit v. Board of Medical Examiners,* 57 Cal. 2d 74, 80 (1961); *Cooper v. State Bd. of Medical Examiners,* 35 Cal. 2d 242, 246 (1950); *Moran v. Board of Medical Examiners,* 32 Cal. 2d 301, 308 (1948)].

The Superior Court remanded the case to the Board of Medical Examiners on the ground that "the decision of the respondent Board is contrary to law and is not based on competent legal evidence" [Finding of Fact No. V, C.T. 88, 241 A.C.A. at 345, 50 Cal. Rptr. at 307]. The trial court specifically found that "the evidence introduced at the hearing was the result of unlawful search and seizure of petitioner's records" [Findings of Fact No. VI and VII, C.T. 88-89, 241 A.C.A. at 345, 50 Cal. Rptr. at 307]. The appellate court, however, reversed the trial court on the ground that the testimony of Dr. Elder compelled a finding that petitioner, as a matter of law, had prescribed methedrine to narcotic addicts. The appellate court concluded that in view of the foregoing, the State's evidence was not prejudicial—even though improperly admitted—and that the Board's findings must be sustained. The holding of the District Court of Appeal on this aspect of the case is erroneous for three basic reasons:

A. The Testimony of Petitioner at the Termination of the Administrative Hearing Was Compelled by the Erroneous Holding of the Hearing Officer That the Exclusionary Rule Is Inapplicable to Administrative Proceedings.

At the conclusion of the hearing Dr. Elder took the stand and testified that he had never knowingly or intentionally treated a narcotic "addict" [231 A.C.A.

at 369, 50 Cal. Rptr. at 322]. Since the charge against Dr. Elder is a misdemeanor in California,[8] petitioner could have refused to testify under the Fifth Amendment of the United States Constitution and under Article I, Section 13 of the California Constitution. But in view of the error of the hearing officer in holding that the exclusionary rule was not applicable herein, Dr. Elder had no realistic alternative but to testify. This decision by Dr. Elder and his counsel to take the stand was compelled by the fact that the ruling of the hearing officer permitted an array of improper testimony by the State's witnesses, including police officers, pharmacists (by stipulation), and a State investigator,[9] for the purpose of showing that the patients whose names appeared in the accusation (which names had been illegally obtained) were in fact addicted to narcotics at the time they received treatment from petitioner.

If the decision herein is allowed to stand on the purported ground that the illegally-obtained evidence was not "prejudicial", we shall have sanctioned a situation wherein the State, by violating petitioner's Constitutional rights under the Fourth Amendment,

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[8]Health and Safety Code Section 11391 provides in part: "No person shall treat an addict for addiction except in one of the following: [there follow certain state and local institutions and exceptions not applicable herein]."

Health and Safety Code Section 11716 provides that: "Every person who violates or fails to comply with any provision of this division, except one for which a penalty is otherwise in this division specifically provided, is guilty of a misdemeanor . . . ." This section is part of Division 10, captioned "Narcotics", which comprises Sections 11000 through 11853.

[9]See summary of the testimony in 241 A.C.A. at 350-356, 50 Cal. Rptr. at 310-315.

has also forced him to surrender his Constitutional rights under the Fifth Amendment. This technique should not be permitted.

The point herein contended, that the error was prejudicial, has been recognized by the courts in several analogous (albeit criminal) cases. In *People v. Roberts,* 63 Cal. 2d 84, 92, 45 Cal. Rptr. 115, 403 P. 2d 411 (1965), which held that the erroneous admission of defendant's statements in evidence and the prosecutor's comments on defendant's failure to take the stand were prejudicial, the Court, in reversing a conviction, said:

> "(I)t cannot be determined what impact the erroneous admission may have had on Roberts' decision not to testify. The prosecution took full advantage of that decision by forcefully commenting on it in his argument. . . . With evidence before the jury that he had repeatedly lied to the police, Roberts and his trial counsel may have concluded that it would be futile for Roberts to attempt to exculpate himself by testifying to other exculpatory facts even if they were true."

The *Roberts* case, of course, concerned a defendant who did *not* take the stand because of a violation of his Constitutional rights under the Fifth and Sixth Amendments. (See, e.g., *Escobedo v. Illinois,* 378 U.S. 478; *People v. Dorado,* 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361; *Griffin v. California,* 380 U.S. 609.) The case, nonetheless, is an apt demonstration of the principle that the courts do not consider Constitutional rights in a vacuum, but instead look to the effect

of a violation thereof on the proceedings as a whole. Thus the unlawful acts of the State officials herein and the evidence subsequently produced thereby cannot be segregated from Dr. Elder's testimony.

Of special significance is the holding in *Fahy v. Connecticut,* 375 U.S. 85 (1963), that illegally-obtained evidence was prejudicial to petitioner, where it appeared that his admissions and confession were induced by being confronted with said evidence at the police station. In addition, the Court said:

> "Nor can we ignore the cumulative prejudicial effect of this evidence upon the conduct of the defense at trial. *It was only after admission of the paint and brush and only after their subsequent use to corroborate other state's evidence and only after introduction of the confession that the defendants took the stand, admitted their acts, and tried to establish that the nature of those acts was not within the scope of the felony statute under which the defendants had been charged.* We do not mean to suggest that petitioner has presented any valid claim based on the privilege against self-incrimination. We merely note this course of events as another indication of the prejudicial effect of the erroneously admitted evidence" [375 U.S. at 91; emphasis added].

In the same manner Dr. Elder, because of the erroneous admission of the State's evidence, was left with no alternative but to take the stand and establish that the nature of his acts was not within the scope of the accusation charged against him. It is respectfully submitted, therefore, that the failure to exclude the evidence was prejudicial error.

B. The Erroneous Admission of Evidence Obtained by an Illegal Search and Seizure Should Not Be Subject to the Normal Rules of "Harmless Error".

Even if the decision of the hearing officer in the administrative proceeding to allow the introduction of illegally-seized evidence were harmless error (which it was not), the salutary policy on which the exclusionary rule is based cannot be fully implemented unless reversal is invariably required whenever such illegally-seized evidence is used as part of the State's case in chief. Both federal and state decisions show that the exclusionary rule was adopted as the only realistic method of deterring unlawful police conduct. Thus, in *Elkins v. United States,* 364 U.S. 206 (1960), the Court said:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. . . . Mr. Justice Jackson summed it up well:
>
> > 'Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is

made, about which courts do nothing, and about which we never hear.

'Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.' *Brinegar v. United States,* 338 U.S. 160, 181 (dissenting opinion)" (364 U.S. at 217).

The Court in *Elkins,* at page 220, then quoted Justice Traynor in *People v. Cahan,* 44 Cal.2d 434, 445, 282 P.2d 905, 911-912, 913 (1954):

"We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. . . . Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court."

The quoted excerpts demonstrate that the purpose of the exclusionary rule is to impress upon state and federal officials the necessity of complying with the Fourth Amendment. Unfortunately, lessons are sometimes learned only by harsh example. The more the impact of the exclusionary rule is brought to bear on errant state officials, the less they will be tempted to

ignore it. The determination of whether erroneously-admitted evidence requires a reversal should not, therefore, turn on the fortuity of whether the police, subsequent to an illegal search and seizure, have diligently applied themselves to obtaining other evidence on which a conviction may be upheld.

The fact that the "constable has blundered", however, will not prevent convictions from being upheld if the harmless-error rule is rejected, for the prosecutor may avoid the consequences of an unlawful search and seizure by refraining from using the illegally-seized evidence or its product. But if, on the other hand, the prosecutor ratifies or tacitly condones "improper state conduct" by using the evidence illegally obtained, the state should not be heard to object that the evidence was only "harmless".[10]

Furthermore, it is no answer to this difficult problem to say, as many do, that if judges cannot agree on whether a search without a warrant was unreasonable under particular circumstances, that the policeman on the beat, who is actually confronted with those circumstances, is placed in an impossible situation. The true fact of the matter is that the police, not the courts, must bear the responsibility for the unhappy dilemma of either freeing an alleged

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[10]See *Bram v. United States*, 168 U.S. 532, 541 (1897): "[T]he prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered . . . was not prejudicial because it did not tend to prove guilt."

criminal or of circumventing the Fourth Amendment. Trial and appellate judges who hear cases are faced with a *fait accompli*—i.e., an unlawful search—but the policeman, in most instances, does not have this "hard" alternative. In other words, when confronted with a set of facts in which the "reasonableness" of a search is unclear, the policeman usually has the alternative either of taking instant action, or of obtaining a warrant. If the police, in these shadowy areas, would select to err on the side of caution, by presenting the facts to a magistrate, instead of acting precipitately, the alleged criminal would not have to go free, nor would the Constitutional rights of innocent citizens, as discussed by Justice Jackson, be infringed. It is therefore believed that by closing off this "harmless error" exception in search and seizure cases, the Court will encourage state and federal officials to give greater heed to the command of the Fourth Amendment.

Although this Court has not explicitly ruled on the question presented herein [see *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963)], the Court, in one case, appears to have tacitly rejected the "harmless-error doctrine." In *Kremen v. United States*, 353 U.S. 346 (1957), supra, F.B.I. agents seized the entire contents of a cabin and removed them to headquarters for examination. The Court stated that:

> "[T]he introduction against each of petitioners of some items seized in the house in the manner aforesaid rendered the guilty verdict illegal" [353 U.S. at 347-348].

The majority did not discuss whether the evidence was prejudicial; however, Justices Burton and Clark, dissenting, said as an alternative ground for upholding the conviction that the error was harmless since there was "ample evidence of guilt otherwise."

It is respectfully submitted that the attainment of a realistic balance between the citizen's constitutional immunity from unreasonable searches and seizure, and the need for effective police enforcement, will be encouraged by a rejection of the harmless-error rule.

C. The Testimony of Dr. Elder Does Not Show That His Patients Were "Addicted" to Narcotics at the Time of Treatment.

The District Court of Appeal held that the testimony of Dr. Elder did not permit a finding and conclusion contrary to those made by respondent Board. At the outset, this holding is questionable since Dr. Elder admittedly made "a categorical general denial that he ever knowingly or intentionally or wilfully treated a narcotic addict, either in his office or any other place, and [made] specific denials as to each and all of the individuals named as addicts in the other testimony before the board" [241 A.C.A. at 369, 50 Cal. Rptr. at 322].

If nothing else, Dr. Elder's testimony created a conflict in the evidence—a question of fact that must be resolved by the trier of fact. In California an appellate Court's power is limited to questions of law and begins and ends with the determination as to whether there is sufficient evidence to sustain the judgment. (See *Endo v. State Board of Equalization,*

143 Cal. App. 2d 395, 399; *Moran v. Board of Medical Examiners,* 32 Cal. App. 2d 301, 308-309; *Le Strange v. City of Berkeley,* 210 Cal. App. 2d 313, 320-321.) The opinion of the District Court of Appeal did not purport to change this rule; therefore the case, for this reason alone, should be remanded to the respondent Board to make a factual determination, based on competent evidence, of whether petitioner was guilty of unprofessional conduct.

Second, the appellate Court misconstrued the definition of a narcotic "addict". Section 2391 of the California Business and Professions Code, on which the charge of unprofessional conduct was based, states in part:

> "Unless otherwise provided by this section, the prescribing, selling, furnishing, giving away or administering or offering to prescribe, sell, furnish, give away or administer any of the drugs or compounds mentioned in section 2390 [which section mentions methedrine] to a habitue or addict constitutes unprofessional conduct within the meaning of this chapter. . . ."

In *People v. O'Neil,* 62 Cal. 2d 748, 754, 44 Cal. Rptr. 320, 401 P. 2d 928 (1965), the California Supreme Court held that in order to prove that a defendant is "addicted", the prosecution's burden is to show:

> "(1) that the defendant has become 'emotionally dependent' on the drug in the sense that he experiences a compulsive need to continue its use,
>
> "(2) that he has developed a 'tolerance' to its effects and hence requires larger and more potent doses, and

> "(3) that he has become 'physically dependent' *so as to suffer withdrawal symptoms if he is deprived of his dosage*" [emphasis added].[11]

Although this definition was used with respect to a provision in the Vehicle Code, the District Court of Appeal herein recognized its applicability to an "addict" as the term is used in Section 2391 of the Business and Professions Code, supra. (See 241 A.C.A. at 374, 50 Cal. Rptr. at 326.)

Dr. Elder, throughout his testimony, emphasized that the patients he treated were *former* addicts; and defined a former addict as "an individual who has gone through his withdrawal symptoms and is not at the time—whether it is 10 days or a week or two weeks or one year or two years—is not taking narcotics;" he confirmed that all of these patients "had a craving" for narcotics [241 A.C.A. at 371, 50 Cal. Rptr. at 324].

Based on Dr. Elder's testimony the District Court of Appeal said that:

> "The crucial question is whether persons treated for depression and a craving for narcotics who are offered Methedrine as a substitute for the narcotic which they crave and who will revert to narcotics if unable to get the Methedrine are 'addicts' or 'ex-addicts'" [241 A.C.A. at 374, 50 Cal. Rptr. at 325-326].

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[11]The Supreme Court's definition is based on the Proceedings of the 1962 White House Conference on Narcotic and Drug Abuse.

The Court then concluded:

> "The petitioner's testimony that he would treat afterwithdrawal symptoms and was treating those who had had a habit, and the admission they were ex-addicts supplies the foregoing elements [in the *O'Neil* decision, *supra*]. The question then resolves into one whether the addict is no longer an addict while he is sustained by a substitute drug. It is manifest that he is being treated for something and if it is not his addiction, it is inconceivable what it can be. . . ." [241 A.C.A. at 374, 50 Cal. Rptr. at 326].

This facile reasoning is unsupportable. Both legal and medical authorities agree, as shown by the *O'Neil* decision, that a vital element of "addition" is the abstinence syndrome, whereby the patient will suffer *withdrawal symptoms* if he is deprived of his dosage. All of Dr. Elder's patients, as the appellate Court itself recognizes, were in a post-withdrawal stage; the only symptom was a continued craving for the drug. These patients were no longer addicts! The beneficial purpose of Dr. Elder's treatment was to prevent them from *reverting* to addiction. The fact that the District Court of Appeal finds it "inconceivable" that petitioner was treating for anything other than "addiction" does not fairly settle the matter. Since the essential third element of the *O'Neil* definition (that is, physical dependence) was no longer present, it is clear that Dr. Elder, in providing follow-up care, was not treating patients who were then presently addicted, but who were *former* addicts.

It is respectfully submitted that the District Court of Appeal, in holding that petitioner was treating addicts, erred both as a matter of medicine and of law.[12]

IV

APPLICABILITY OF THE EXCLUSIONARY RULE TO ADMINISTRATIVE PROCEEDINGS.

The District Court of Appeal assumed without deciding that the exclusionary rule applied to administrative hearings as well as to criminal prosecutions, and quoted the following language from *People v. One 1960 Cadillac Coupe,* 62 Cal. 2d 92, 96-97, 41 Cal. Rptr. 293, 396 P. 2d 709 (1964), as indicative of the trend in this area:

> "The People also contend that, conceding the unlawfulness of the seizure, the exclusionary rule should not be applied in a car-forfeiture case, as the action is civil in nature. Whatever the label which may be attached to the proceeding, it is apparent that the purpose of the forfeiture is deterrent in nature and that there is a close identity to the aims and objectives of criminal

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[12] Although Business and Professions Code section 2391, supra, condemns the furnishing or prescribing of dangerous drugs to a "habitue or addict", the opinion herein was limited only to the question of whether Dr. Elder's patients were addicts. Therefore, the definition of "habitue" is not at issue on this appeal. Of interest, however, is the fact that Webster's New Collegiate Dictionary defines "habitue" only as "One who frequents a place or class of places." Webster's Third New International Dictionary additionally defines "habitue" as "a drug addict." The word apparently is not used in medical dictionaries. The legislative phrase, "habitue or addict", if not patently ambiguous, is tautological.

> law enforcement. *On policy the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property*" [Emphasis added].

The same result was reached in *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693 (1965), which reversed a holding by the Pennsylvania Supreme Court that the exclusionary rule did not apply to a forfeiture proceeding. The grounds of the State Court decision was that the action was civil in nature. This Court pointed out that the petitioner was nonetheless subject to the loss of his automobile which, at the time involved, had an estimated value that was higher than the maximum fine in the related criminal offense charged against petitioner. The Court then said:

> "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible" [380 U.S. at 701].

Thus there is no validity to the so-called distinction between criminal and forfeiture proceedings, since both exact a penalty against the petitioner. The decision to invoke the exclusionary rule, of course, is bottomed on the policy of discouraging "official lawlessness in flagrant abuse of that basic right . . ." guaranteed by the Fourth Amendment [*Mapp v. Ohio,* 367 U.S. 643, 655 (1961)]. As stated in the California

forfeiture case, *supra,* the rule applies to "improper state conduct" which contemplates the deprivation of one's liberty or property. In view of these holdings, and the policy underlying them, no basis can be seen for treating an administrative revocation proceeding as sui generis. The right to practice medicine is an acknowledged property right [*Hewitt v. Board of Medical Examiners,* 148 Cal. 590, 592], the loss of which will be far more disastrous to petitioner than the deprivation of a used car. The announced policy of the exclusionary rule will be seriously diluted unless it is uniformly applied in *all* state proceedings in which officials have acted unlawfully. To paraphrase the quoted language in the Pennsylvania case, *supra,* it would be anomalous indeed to hold that in a criminal proceeding[13] against Dr. Elder for unlawfully treating an addict, the illegally seized evidence is excludable, while in an administrative proceeding to revoke his license, the same evidence would be admissible.

[13]See, e.g., Health and Safety Code, Sections 11391 and 11716.

CONCLUSION

The holding in this case is an example of the exception that has devoured the rule. The rule is that the people shall be secure against unreasonable searches and seizures, and that no warrants shall issue, but upon probable cause. The exception (based on judicial recognition of the problems inherent in law enforcement) is that a search may be made without a warrant as an incident to a valid arrest. The decision herein, however, construes the exception so as to permit the police, without a warrant, to conduct an unrestricted and unreasonable search *for any purpose* (including a search of third persons and of their property) solely because an arrest has been made, even though that arrest is merely a pretext for the search.

It is respectfully submitted that because of this dangerous and novel precedent, the case at bar should be reversed.

Dated, San Francisco, California,
August 19, 1966.

REGINALD G. HEARN,
Attorney for Petitioner.

(Appendices Follow)

Appendix 1

EXHIBIT "A"

Before the Board of Medical Examiners
of the State of California

In the Matter of the Accusation of Harry M. Elder, M.D., Respondent.	No. D-702

DECISION

The above-entitled matter came on regularly for hearing upon an Accusation before the Board of Medical Examiners of the State of California and Harold A. Furst, Hearing Officer, Office of Administrative Procedure, at San Francisco, California, on June 18 and 19, 1963. Gerald F. Carreras, Deputy Attorney General, appeared on behalf of said Board of Medical Examiners. The respondent, Harry M. Elder, M.D., was present and was represented by J. W. Ehrlich and Edward Dullea, his attorneys. Evidence both oral and documentary was introduced, the proceedings were phonographically reported, the matter submitted and the hearing closed. After due consideration the Board of Medical Examiners of the State of California makes the following findings of fact:

I

Wallace W. Thompson is a citizen of the United States, over the age of twenty-one years, and the duly

qualified and appointed Executive Secretary of the Board of Medical Examiners of the State of California, and made the Accusation in his official capacity as such, and not otherwise.

II

On or about the 23rd day of August, 1935, the Board of Medical Examiners of the State of California issued to Harry M. Elder License No. A-06824, authorizing him to practice medicine in the State of California, and such license was at all of the times mentioned herein in full force and effect.

III

Between the approximate dates of March 1, 1960, and August 3, 1962, respondent prescribed Methedrine ampules for the persons listed in Appendix "A" (which is attached to the Accusation and incorporated by reference). A substantial number of said persons were at all times material a habitue or addict. Said Methedrine ampules are a dangerous drug as defined by Sections 2390 and 4211 of the Business and Professions Code of the State of California.

IV

Between the approximate dates of August 4 and August 23, 1962, respondent prescribed Methedrine ampules for the persons listed in Appendix "B" (which is attached to the Accusation and incorporated by reference). A substantial number of said persons were at all times material a habitue or addict. Said Methedrine ampules are a dangerous drug as defined

by Sections 2390 and 4211 of said Business and Professions Code.

It has not been shown by a preponderance of evidence that said prescribing on the part of respondent was done without either a prior examination of the person or medical indication for the prescribing.

V

Between the approximate dates of June 1, 1960, and July 9, 1962, respondent prescribed Percodan and Empirin Compound with Codeine for the persons listed in Appendix "C" (which is attached to the Accusation and incorporated by reference). A substantial number of said persons were at all times material a habitue or addict. Said Percodan and Empirin Compound with Codeine are narcotics as defined by Sections 11001 and 11002 of the Health and Safety Code and Section 2390 of said Business and Professions Code.

* * * *

Pursuant to the foregoing findings of fact, the Board of Medical Examiners makes the following determinations of issues:

I

The Matters found in Findings III and IV show that respondent has violated the provisions of Sections 2391 and 2391.5 of the Business and Professions Code of the State of California, and Section 11391 of the Health and Safety Code of the State of California, which constitutes grounds for disciplinary action under Sections 2361 and 2378 of said Business and Professions Code.

II

The matters found in Finding IV do not show a violation of Section 2399.5 of said Business and Professions Code.

III

The matters found in Findings V show that respondent has violated the provisions of Sections 2391 and 2391.5 of said Business and Professions Code, and Sections 11162.5, 11164, 11168 and 11391 of said Health and Safety Code, constituting cause for disciplinary action under Sections 2361 and 2378 of said Business and Professions Code.

* * * *

Wherefore, the Board of Medical Examiners makes the following order:

1. That the license heretofore issued to Harry M. Elder, M.D., respondent above named, being License No. A-06824, authorizing him to practice medicine in the State of California, be and the same is hereby revoked.

2. That the above order of revocation is imposed for each of the separate and several violations herein found and determined.

3. That this Decision shall be effective on the 29th day of July, 1963.

Board of Medical Examiners
of the State of California
/s/R. M. Wallerius, M. D.
Raymond M. Wallerius, M.D.,
Secretary-Treasurer

Dated: June 28, 1963.

Appendix 2

Entered
Vol A120 Page 06
Jul 24 1964
Martin Mongan, Clerk
By D. Panattoni
Deputy Clerk

Filed
Jul 23, 1964
Martin Mongan, Clerk
By P. F. Ebarle
Deputy Clerk

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 534292

Harry M. Elder, M.D.,
Petitioner,

vs.

Board of Medical Examiners of the State of California,
Respondent.

JUDGMENT

This cause came on regularly for trial before the Honorable Joseph Karesh in Department No. 16 of the above-entitled court on the 2nd day of December, 1963 and the 31st day of January, 1964, petitioner appearing through his attorneys J. W. Ehrlich and Edward F. Dullea, and respondent appearing through the Honorable Stanley Mosk, Attorney General, by Gerald Carreras, Deputy Attorney General, and the

court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith, Now, Therefore, by reason of the law and findings aforesaid,

It is Hereby Ordered, Adjudged and Decreed that the ruling of the respondent Board revoking the petitioner's license is an abuse of discretion and it is hereby vacated, annulled and set aside and that this matter is hereby remanded to the State Board of Medical Examiners with the direction that any evidence procured or any information obtained as the result of the illegal search and seizure or by misrepresentation not be received in said hearing.

Dated this 21st day of July, 1964.

Joseph Karesh,
Judge of the Superior Court.

(Notice of Appeal to District Court filed 8/3/64)

Stanley Mosk, Attorney General
of the State of California
Gerald F. Carreras, Deputy Attorney General
6000 State Building
San Francisco, California 94102
UNderhill 1-8700
Attorneys for Board of Medical Examiners
of the State of California

Notice mailed
Filed
Aug. 3, 1964
Martin Mongan, Clerk
By F. G. Thomas
Deputy Clerk

Superior Court of the State of California
for the City and County of San Francisco

No. 534292

Harry M. Elder, M.D.,
Petitioner,

vs.

Board of Medical Examiners of the State of California,
Respondent.

NOTICE OF APPEAL

To the Clerk of the above-entitled court; to petitioner above named; and to J. W. Ehrlich, by Edward F. Dullea, his attorneys of record:

You and Each of You Will Please Take Notice that the respondent above named hereby appeals to the

District Court of Appeal of the State of California, First Appellate District from the whole of the Judgment in favor of petitioner and against respondent, entered on the 24th day of July, 1964, in Judgment Book Volume A-120, at page 6 thereof.

Dated: August 3, 1964.

(A Statement of Service by Mail is attached to the original of this document.)

Stanley Mosk
Attorney General of California
Gerald F. Carreras
Gerald F. Carreras
Deputy Attorney General
Attorneys for Respondent.

Appendix 3

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 22,535

Harry M. Elder, M.D.,
Petitioner and Respondent,
vs.
Board of Medical Examiners of the State of California,
Respondent and Appellant.

OPINION

The Board of Medical Examiners of the State of California, hereinafter referred to as "the board," has appealed from a judgment rendered and entered following a hearing on a petition for writ of mandate filed in the superior court by Harry M. Elder, M.D., hereinafter referred to as "petitioner," to review the decision and order of the board which revoked his license to practice medicine in this state.

The judgment provides that it is ordered, adjudged and decreed "that the ruling of the respondent Board

revoking the petitioner's license is an abuse of discretion and it is hereby vacated, annulled and set aside and that this matter is hereby remanded to the State Board of Medical Examiners with the direction that any evidence procured or any information obtained as the result of the illegal search and seizure or by misrepresentation not be received in said hearing." This judgment follows the recitals contained in conclusions of law which were signed and filed the same day. These conclusions in turn are predicated upon findings of fact, if they may be so termed, which read as follows: "IV. It is true that respondent prejudicially abused its discretion in said proceeding upon said accusation of petitioner in that respondent had proceeded without and in excess of its jurisdiction; that respondent has not proceeded in the manner required by law in the institution and conduct of said proceeding upon said accusation of the petitioner; it is further true that petitioner was not afforded a fair trial in the hearing upon said accusation.

"V. It is true that the decision of the respondent Board is contrary to law and is not based on competent legal evidence.

"VI. It is true that respondent Board failed to follow the procedure provided by law and denied petitioner a fair trial. It is further true that the evidence introduced at the hearing was the result of unlawful search and seizure (while petitioner was outside the United States) when the agents of respondent Board arrested the office nurse of petitioner (charging her with unlawfully practicing medicine and she was

found not guilty of this charge) and seized all of petitioner's patients' records which are confidential and protected under the laws of the State of California; and it is further true that at the time of the seizure of the patients' records, respondent Board and its agents did not have any search warrant therefor. It is true that the evidence introduced by respondent was the result of the unlawful search and seizure of petitioner's records.

"VII. It is true that the evidence presented by respondent Board was produced and obtained as a result of the unlawful search and seizure of petitioner's records."

The board seeks an affirmance of its order, and contends on this appeal that the evidence at the hearing before the board sustains its decision and order; and that the record fails to support the findings of the superior court in any of the particulars stated therein. It asserts (1) that no objections were made on the grounds of unlawful search and seizure to the evidence actually admitted and upon which the board predicated its decision; (2) that insofar as there is evidence in these proceedings which reflects a seizure of other excluded evidence, it fails to show that that seizure was unlawful; (3) that none of the evidence allegedly unlawfully seized was admitted into evidence in these proceedings or used to support the board's decision; and (4) that, in any event, if there was any unlawfully seized evidence admitted it was not prejudicial because the other evidence of petitioner's guilt was overwhelming. Finally, the board asserts (5) that

the rule which precludes the use of unlawfully seized evidence in a criminal proceeding does not apply to an administrative proceeding for the revocation of a license.

The board fails to meet the full thrust of the trial court's findings which is not that the evidence introduced was itself unlawfully seized as the result of an unlawful search, but that it was the fruit of, and was produced and obtained as the result of an unlawful search and seizure of petitioner's records. Petitioner in support of the trial court's judgment has refused to accept the board's challenge to point out the particulars in which his rights were violated or the specific evidence which resulted therefrom. He has contented himself with a general statement of constitutional principles to establish that his license cannot be revoked without due process of law, that the use of records obtained by an illegal search and seizure would be a violation of his rights, and that in any event mere evidence cannot be seized in connection with an arrest.

In order to untangle this skein of disparate approaches to the fundamental question at issue: the validity of the decision and order of the board (Code Civ. Proc. § 1094.5; and Gov. Code § 11523), the patient reviewer must start with the accusation filed against petitioner and unravel the circumstances as they are reflected by the record.

The accusation dated May 6, 1963 charges in a first cause of action that between the approximate dates of March 1, 1960 and August 3, 1962 petitioner pre-

scribed Methedrine ampules[1] for 100 named individuals in violation of sections 2391[2] and 2391.5[3] of the Business and Professions Code and section 11391[4] of the Health and Safety Code. In a second cause of action it is charged that between the approximate dates of August 4 and August 23, 1962 petitioner prescribed Methedrine ampules for 72 named individuals in violation of the provisions of law mentioned above, and also in violation of section 2399.5 of the Business and Professions Code.[5] A final cause of action alleged that between June 1, 1960 and July 9, 1962 petitioner prescribed Percodan and Empirin Compound with

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[1]That Methedrine is a dangerous drug as defined by section 4211 and mentioned in section 2390 of the Business and Professions Code is not questioned. (See Randle v. Cal. State Bd. of Pharmacy (1966) 240 A.C.A. 264, 266; and People v. Brotherton (1966) 239 A.C.A. 211, 220, fn. 4.)

[2]Business and Professions Code section 2391 provides in part: "Unless otherwise provided by this section, the prescribing, selling, furnishing, giving away or administering or offering to prescribe, sell, furnish, give away or administer any of the drugs or compounds mentioned in section 2390 to a habitue or addict constitutes unprofessional conduct within the meaning of this chapter. [There follow exceptions not pertinent herein.]"

[3]Business and Professions Code section 2391.5 provides: "The violation of any of the statutes of this State regulating narcotics and dangerous drugs, constitutes unprofessional conduct within the meaning of this chapter."

[4]Health and Safety Code section 11391 provides in part: "No person shall treat an addict for addiction except in one of the following: [there follow certain institutions and exceptions not applicable herein]."

[5]Business and Professions Code section 2399.5 provided: "Prescribing dangerous drugs as defined in Section 4211 without either a prior examination of the patient or medical indication thereof, constitutes unprofessional conduct within the meaning of this chapter." The board's decision found that the charge under this section was not established, and it is not of further concern.

Codeine[6] for three named individuals in violation of the section of the Business and Professions Code first mentioned and of sections 11162.5, 11164, 11168 and 11391 of the Health and Safety Code.[7]

The accusation further points out that the alleged conduct of petitioner in each cause of action constituted grounds for the suspension or revocation of his license under sections 2361 and 2378 of the Business and Professions Code.[8]

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[6]Percodan and Empirin Compound with Codeine are admittedly narcotics as defined in sections 11001 and 11002 of the Health and Safety Code and mentioned in section 2390 of the Business and Professions Code.

[7]Health and Safety Code section 11162.5 provides: "A prescription, in order to be effective in legalizing the possession of unstamped narcotic drugs and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. The responsibility for the proper prescribing and dispensing of narcotic drugs is upon the practitioner but a corresponding liability rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of this division; and the person filling such an order, as well as the person issuing it, may be charged with violation of the law."

Section 11164 provides: "No person shall prescribe for or administer, or dispense a narcotic to an addict, or to any person representing himself as such, except as permitted by this division."

Section 11168 provides: "No person shall prescribe, administer, or furnish a narcotic except under the conditions and in the manner provided by this division."

Section 11391, see fn. 4.

[8]Section 2361 provides: "The board shall take action against any holder of a certificate, who is guilty of unprofessional conduct which has been brought to its attention, or whose certificate has been procured by fraud or misrepresentation or issued by mistake."

Section 2378 provides: "The violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of

On the receipt of the accusation the petitioner filed his notice of defense and request for hearing and the matter was regularly heard on June 18 and 19, 1963. Thereafter, on June 28, 1963 the board made its decision and order in which it found that petitioner was guilty of the charges, with the exception of the alleged violation of section 2399.5 of the Business and Professions Code, and ordered his license revoked for each "of the separate and several violations."

The principal elements of the charges as evidenced from an examination of the sections of law referred to, and as recognized by petitioner at the hearing, are (1) whether petitioner prescribed the alleged drug for any of the individuals concerned, and (2) whether that individual was an addict. In an attempt to establish these facts the board subpoenaed petitioner's records relating to the individuals for whom he had prescribed Methedrine. According to petitioner's testimony in a prior action, a transcript of which was admitted in the hearing before the board, the records consist of cards entitled, "Patients Financial Record Card" and each is a combination financial record and history and treatment card. The board also subpoenaed the pharmacists who allegedly filled the prescriptions which petitioner allegedly gave to the individuals named in the accusation.

The attorney for the board called as his first witness petitioner's office nurse. She identified two stacks of

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or conspiring to violate any provision or term of this chapter constitutes unprofessional conduct within the meaning of this chapter."

records then before the court as records of the doctor's "Methedrine patients." These cards she kept separately for "my convenience in filing them, because as far as phone calls from patients and so forth and billing them, I do not send them out a bill every month. They usually either pay cash or I give them a statement before they leave the office to send their remittance in . . ." They were differentiated from "regular patients" which included everyone else except the ones for which petitioner prescribed Methedrine. She also maintained the records separately for "O.B." for "O.A.S." patients and for other categories under her own filing system. When the witness was asked what portion of the records she completed, petitioner objected on the ground that that question called for a privileged communication. In argument which extends over twelve pages of the hearing transcript the objection was considered as going to the admission into evidence of the record cards themselves. The attention of the hearing officer was directed to the physician-patient privilege as then found in the provisions of subdivision 4 of section 1881 of the Code of Civil Procedure,[9] to the provisions of section 11513 of the

[9]Code Civ. Proc. §1881 provided in part: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: . . . 4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; [there follow exceptions not applicable here]."

By Stats. 1965, ch. 923, p. 2532, §1, paragraph "4" was amended to include professional assistants of the physician within

Government Code which declared: "'The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions . . .";[10] and to various provisions of the Health and Safety Code and Business and Professions Code which assertedly provide for the keeping and inspection of records.[11] The hearing officer concluded under the law as it then existed (Code Civ. Proc. § 1881, subd. 4; Gov. Code § 11513; and see Marlo v. State Bd. of Medical Examiners (1952) 112 Cal. App. 2d 276, 282 and Foster v. McConnell (1958) 162 Cal. App. 2d 701, 707), that the case histories could not be received in evidence unless the patient waived the privilege.

In an effort to show that the privilege had been waived in part there was offered in support of the accusation a transcript of a hearing before the State Board of Pharmacy containing testimony of petitioner

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the scope of those who cannot be examined without the consent of the patient, and by the addition of provisions which make the privilege inapplicable to proceedings such as these. (See also Evidence Code §1007; Stats. 1965, ch. 299, art. 6, p. 1331, operative Jan. 1, 1967, and comment, Assembly Committee on Judiciary, Assembly J. Apr. 6, 1965, p. 1749; and cf. comment, §§998 and 999, Cal. Law Rev. Comm., Jan. 1965.)

[10]By Stats. 1965, ch. 299, p. 1366, §135, operative Jan. 1, 1967, Gov. Code §11513 was amended to provide: "The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing . . ."

[11]Health and Safety Code section 11102 (function of division of state Division of Narcotic Enforcement), §11107 (inspection of records by Board of Pharmacy), §§11225-11226 (prescriber's record of narcotic prescription); and see §11166.10 (prescription book). Business and Professions Code §4051 (record of drugs dispensed by physician); and §4232 (record of sale or disposition of dangerous drugs).

in which he identified fifty-one "Patients Financial Record Cards" as representing records of patients for whom the pharmacist in question had refilled Methedrine prescriptions during the period from August 4 to August 25, 1962, while the petitioner was away. The cards were received in evidence without objection in those proceedings. The hearing officer refused to admit the transcript, or the record cards, and they were marked for identification only. Thereafter, over petitioner's objection that it was too general, there was read into the record petitioner's prior testimony to the effect that the common factor for the prescription of 20 mg. ampules of Methedrine for the patients reflected in the fifty-one record cards was that they were "mostly either alcoholics or drug addicts, narcotic addicts." However, a second attempt to get in the record cards which had been made a matter of public record in the prior action was unsuccessful.

In the meantime, arrangements had been made to dispense with the presence of the pharmacists. After some equivocation it was finally stipulated as follows: ". . . that if the pharmacists responded to the subpoenas duces tecum issued by the Board of Medical Examiners, that their records would show that Dr. Elder prescribed and they dispensed Methedrine ampules for the persons listed in—. . . Schedule A in the accusation and for the persons listed in . . . Schedule B. It is further stipulated that if the pharmacists responded to said subpoenas that their records would show that Dr. Elder prescribed and the pharmacists dispensed Percodan and Empirin Compound with

codeine for the persons listed in Schedule C. Nothing in this stipulation shall be construed as admitting the truth of the charging allegations of the accusation, nor shall it be construed as a waiver of the physician-patient relationship."

Examination of petitioner's nurse proceeded along general lines without specific reference to particular patients. On the advice of counsel she refused to answer the following question: "Could you tell us what the patients—the Methedrine patients [which she had separated in her files for convenience] . . . were being treated for?" She testified that they did not have the situation at petitioner's office where patients would come in and ask for Methedrine by name; that it was not her practice to question the patients as to what the medication was for; that petitioner went to a medical convention in Rio de Janeiro from August 4 to August 23 or 24, 1962, during which period she was in the office; that there were some patients—"60 percent"—"75 to 100"—who received refills of Methedrine prescriptions for sixty 20 mg. ampule Methedrine to be taken once, twice or three times daily during the period for a payment or charge of $7.50 each; that in accordance with instructions from the petitioner when the patient came in for a refill she got out his chart which showed the prescription with the number, the strength of medication and how it was to be used; that if it appeared from the date and dosage of the prior prescription that it was time for a refill she would take the patient's blood pressure, make the refill on the card and give the

patient a receipt with the number to take to the pharmacy; that where there was no prescription number presented from the old label the patient would have the pharmacist telephone, and she would check the patient's identity by birthdate and authorize the refill while noting the pharmacy on the chart. Her denial that patients would come in and specify that they wanted Methedrine was impeached by her admission that she made a notation "New Methedrine" on the charts, and her testimony in a Board of Pharmacy proceeding that patients would come in and so specify.

She testified that she would not know whether any of petitioner's patients were narcotic addicts; that she was never told that some of his patients were narcotic addicts; and that she never told anyone they were narcotic addicts or that they were being treated for addiction and alcoholism. She stated that she had noted abscesses on some of the patients in treatment but did not know the cause. She admitted that she had taken histories including some which revealed past narcotic addiction. Attempts to elicit the names of these patients was forstalled by petitioner's successful assertion of the patient's privilege.

The nurse further testified that on a couple of occasions she had prepared lists of Methedrine patients at petitioner's request so he could check names with enforcement agencies or other doctors; and identified certain lists as comprising part prepared by herself and part received in the mail. She stated that certain entries on the lists were in her handwriting. The hearing officer had the lists marked for identification but

refused to admit them in evidence because of petitioner's claim that the list of patients was privileged.[12] The nurse was then requested to read the notations in her handwriting and was instructed not to answer. She did testify that "no more" indicated no more Methedrine to the individual so noted. After further discussion petitioner's counsel stipulated that the notations which the nurse wrote could be admitted in evidence. She identified her notations and some of petitioner's, and testified in substance that they indicated reasons for refusing further prescriptions to the persons concerned such as getting prescriptions from another doctor, in jail, or selling Methedrine.

The senior special investigator for the Department of Professional and Vocational Standards testified that on August 23, 1963, he went to petitioner's office with an inspector from the State Board of Pharmacy and two officers of the San Francisco Police Department armed with a warrant for the arrest of petitioner's nurse.[13] At the time of her arrest she was asked where the records were of the patients who had received authorization for Methedrine during the period of the doctor's absence. She indicated some which were loose on top of a desk adjoining hers as part of them and stated that the others were in a metal filing cabinet on a shelf lower down. Over petitioner's objection the investigator testified that he went through the cards that were in the metal filing

[12]The propriety of this ruling is not before us. The board in its appeal takes the position that the lists were excluded.

[13]The circumstances of her arrest are hereinafter considered.

cabinet designated by the nurse; that he read all of them that related to people who were using Methedrine; that "On many of the record cards was the notation—a similar notation to the effect that Methedrine helps; reduces craving for heroin, or narcotics addiction, Methedrine keeps him from going back to the stuff; last fix two days ago; needs Methedrine to keep of [sic] H; similar other notations."

According to the investigator, on being asked, the nurse stated that the reason petitioner was prescribing Methedrine to all these people was for alcoholism and addiction—drug addiction.

The remaining evidence presented in support of the charge was adduced in support of the contentions that those who were embraced in the stipulation as recipients of prescriptions for the prescribed drugs from petitioner in fact fell within the category of "habitue or addict" as those terms are used in section 2391 of the Business and Professions Code, and that petitioner in prescribing for them violated the mandate of section 11391 of the Health and Safety Code which recites: "No person shall treat an addict for addiction except in one of the following: [named institutions and places]."

An inspector of the San Francisco Police Department, who had been with the narcotics bureau of that department for fourteen years, testified that he was familiar with and had arrested narcotic addicts, that he was familiar with the signs that would indicate a persons to be a narcotic addict, and that he had dis-

cussed narcotic addicts with other officers and checked records concerning them. He identified nine individuals on Schedule A and five individuals on Schedule B as addicts or habitues. He was unable to fix the time of addiction as being within the respective dates charged in the accusation, but stated that they were habitually addicts; that a very small proportion of them changed their habits and those that changed them permanently were buried; that he had known periods of time when given individuals were not using narcotics because they were imprisoned; that he would not classify persons as addicts at a particular time if they were not currently using any narcotics; that the addict is psychologically bound forever, there is always a residual element in his mind that he cannot get rid of. Petitioner's objection to this witness' characterization of the named individuals as addicts on the grounds that it failed to show the time at which such status existed was overruled.

Another inspector with five years' experience in the same bureau testified that as operator of the Nalline Clinic he had administered a test to one individual on Schedule A who had 77 needle stabs in different parts of the arms on April 30, 1961, and that there was a positive reaction which indicated that he was under the influence of a narcotic at that time. He also reported positive tests on two individuals named in Schedule B, of which one was administered a year and one-half prior to the period in question. Petitioner's motion to strike the testimony concerning the latter test was denied.

A narcotic agent with the Bureau of Narcotic Enforcement of the State Department of Justice stated that in his eighteen years' experience he had familiarized himself with narcotic addicts, had occasion to arrest them and had discussed them with other officers and reviewed reports about them. He testified that he had separately arrested and secured the conviction of two of the individuals named on Schedule C for a stolen prescription and fictitious address, respectively, in connection with narcotic medication, within the period set forth in the third charge; and that at the time of his arrest there were indications that each of the individuals was addicted to narcotics. He identified a husband and wife on Schedule B as addicts and users of Methedrine, and stated the wife had but a month before sought and obtained her own commitment for the use of Methedrine as a habit-forming drug. A motion to strike this testimony for lack of time element was denied. Testimony regarding another individual on Schedule A was stricken because of the agent's lack of knowledge of his condition. He further identified two individuals on Schedule A and two on Schedule B as addicts and users, but was unable to fix the time of their addiction between the respective charging dates. This agent further testified that Methedrine was a palliative of first choice to a narcotic addict when heroin was not available; that the wife mentioned above was securing dosages from petitioner and other doctors and only sought commitment when she was cut off of Methedrine; that Methedrine medication was substituting for some of the narcotics;

that most of the names on the state records he had known as former heroin addicts during his eighteen years' experience; that very few who take Methedrine and stop taking heroin, ultimately stop taking Methedrine; that as far as a cure is concerned, with few exceptions it is necessary to go out and get [confine] either a heroin or a Methedrine user; and that somewhat better than 90 per cent of those who once became addicted to heroin are known recidivists.

A field supervisor of agents for the State Bureau of Narcotic Enforcement, whose qualifications were admitted by petitioner, testified that he knew 17, possibly 19, specific individuals on Schedule A, 5 on Schedule B, and one on Schedule C as narcotic addicts; and that he knew 6 on A, 6 on B and one on C as users of narcotics. At the request of petitioner he defined his distinction as follows: "In my interpretation of the law anyone who uses narcotics illegally is therefore an addict. However, the individuals who I called addicts are those who use it compellingly and must use it to maintain a normal appearance or feeling of normality."

There was also received in evidence commitment papers for an individual named in Schedule A, who was also otherwise identified as an addict. These papers showed a discharge and certificate of competency as of July 3, 1962. Other documentary evidence reflects a commitment October 10, 1960 for habit forming drugs—barbital addiction of an individual named in Schedule A; and a death certificate of an-

other individual on that list showing his death February 27, 1962 due to alkaloid of morphine group.

Over the objection of petitioner, written waivers of privilege were presented for one individual on Schedule A and two on Schedule B. Copies of their record cards were thereupon received in evidence, and the first patient's card reflects in part "Began Demeral Morphine . . . main-last fix July 20, 1962 4 demeral tablets one does get sick on heroin Habits $30-40 daily . . ." A new patient on July 24, 1962, he received a prescription for Methedrine to be taken three times a day. The card for one patient on Schedule B reflects a first visit on May 29, 1962 with a recorded history and symptoms which reflects in part "Heroin a few times Morphine for past year . . . none for 4 months; Methedrine for 4 months—Methedrine-spin—stops craving for alcohol or narcotics." Methedrine three times daily was prescribed, refilled June 15, July 11, reduced to twice daily August 1, and refilled August 17, during petitioner's absence for three times daily. The other first appeared July 23, 1962 with a history which reflects "Heroin habit at age 16—1958—to Sept. 1961 $10-$15 habit. Last fix Sept. 1961. Gets depressed—feels tired. Vag. addict—Probation 1 year 1-2 daily Meth. stops craving." Methedrine twice a day was prescribed and was refilled during petitioner's absence on August 22, 1962.

A Contra Costa County Deputy Sheriff testified that in February 1963, when he made inquiry about a patient listed in Schedule A the nurse advised that "he was under treatment for addiction." The witness

could not say whether addiction was for Methedrine or narcotics. An Alameda Sheriff's Detective was more specific. His telephone inquiry concerning an individual on Schedule A in March 1963 produced a statement from someone representing himself as petitioner that he was treating that individual for narcotics addiction and had prescribed Methedrine to be taken by liquid injection because the majority of narcotic addicts have a fetish about using the needle.

A newspaper reporter testified that in the week preceding the hearing before the board he interviewd petitioner at his attorney's office at the latter's request. Petitioner related that he was treating addicts and former addicts with Methedrine; that the first patient had come to him about three years previously after a doctor who had been prescribing Methedrine had gone out of business for one reason or another; that he sometimes finds that these patients need or have been taking very large quantities of Methedrine and he would attempt to step them down and finally get them off the drug altogether if he could; that he would sometimes prescribe as many as 75 to 100 ampules to begin with and later reduce this in the course of a few weeks; that his purpose was to help these people get off of heroin; that he felt he was succeeding in some degree because he had about a dozen patients who were taking neither heroin nor any other narcotic, and who were free, who had stopped taking Methedrine; that although this was a very small number, it compared favorably with conventional treatment in state and federal institution. Petitioner used the word

"addicts" several times and was corrected by one of his attorneys who said, "You mean former addicts" and petitioner replied, "Yes, I mean former addicts." This witness also testified that petitioner had stated at a public hearing before the Board of Pharmacy examiners that he had between 200 and 300 addicts and former addicts as patients. A copy of the newspaper article written by the witness was also received in evidence as acknowledged hearsay. (See Gov. Code § 11513, subd. (c).)

Finally a portion of transcript of another Board of Pharmacy hearing was offered and received. It reflects testimony of petitioner as to arrangements made for refilling Methedrine prescriptions in his absence.

At this point petitioner's attorney addressed the board as follows: "One, I want to address myself to a general motion for dismissal. I'll call Your Honor's attention to the fact that Your Honor, over my objections, admitted certain things in evidence, regardless of the question of search and seizure . . . Your Honor has ruled that my motion to strike the testimony of Mr. Smith on unlawful search and seizure—you denied that . . . and denied it in each instance where I made the motion. I don't have the transcript, so I don't have them all." The same point is found more articulately stated in petitioner's petition for writ of mandate as follows: "all of the evidence introduced at the hearing was the result of unlawful search and seizure when the agents of respondent board arrested the office nurse of petitioner and seized all of his

patients' records, which are confidential and protected under the laws of the State of California; that at the time of the seizure of the records, respondent Board and its agents did not have any warrant therefor." Finally, it is expressed in the findings of fact and conclusions of law of the superior court which were first set forth herein.

The applicability of the exclusionary rule of the criminal law to the license revocation proceedings is undetermined

The hearing officer ruled that the policy of excluding evidence seized by an unlawful search and seizure (People v. Cahan (1955) 44 Cal. 2d 434, 445) did not apply to administrative hearings, at least where there was some right to inspect and investigate the business of a licensee. (See Colley v. State Bd. of Funeral Directors (1956) 141 Cal. App. 2d 293, 298.) The question was postulated but not decided in Thorp v. Dept. of Alcoholic Bev. Control (1959) 175 Cal. App. 2d 489, 492. Since the trial court pronounced judgment the Supreme Court in People v. One 1960 Cadillac Coupe (1964) 62 Cal. 2d 92, applied the rule to proceedings for forfeiture of property. The following language appears to bear out the foresight of the trial judge in this case who ruled that it was erroneous for the hearing officer to rule as outlined above. "The People also contend that, conceding the unlawfulness of the seizure, the exclusionary rule should not be applied in a car-forfeiture case, as the action is civil in nature. Whatever the label which may be attached to the pro-

ceeding, it is apparent that the purpose of the forfeiture is deterrent in nature and that there is a close identity to the aims and objectives of criminal law enforcement. On policy the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property. (See People v. Cahan, 44 Cal. 2d 434, 445 [282 P. 2d 905, 50 A.L.R. 2d 513].)" (62 Cal. 2d at pp. 96-97.)

In view of the foregoing it will be assumed herein that the exclusionary rule will apply to an administrative hearing where the proceeding contemplates the deprivation of a license which is recognized as a property right, as is the right to practice medicine. (See Hewitt v. Board of Medical Examiners (1906) 148 Cal. 590, 592.)

This assumption, however, does not establish the other postulates of the trial court's decision. The record must be examined to determine whether the adoption of an assumed erroneous legal theory by the hearing officer occasioned any prejudicial error. If there was no unlawful search or seizure, or if no documents so seized were admitted in evidence or were the source of other evidence that was admitted, the findings of the trial court cannot be sustained.

The record fails to reflect an unlawful search and seizure

The trial court announced its conclusions as to the legality of the seizure of the records as follows: "I am convinced that the records that they seized at the

time—those records at the time they went in and arrested the nurse, it was an illegal search, the fact that they arrested the nurse, and incidental to her arrest, picked up all these records. It is obvious they were looking for the doctor's records. . . . And you have to look at the intent of the parties. So I hold the search illegal, and the question is whether or not there was any evidence other than the illegal evidence upon which . . . the hearing officer could have based his finding."

It may be obvious that they were looking for the doctor's records, but it does not follow that the search was illegal on that account if it was supported by a valid arrest. When the chaff of counsel's declarations is winnowed from the wheat of evidence the following pertinent information is gleaned from the record:

The senior special investigator for the State Department of Professional and Vocational Standards, an inspector from the State Board of Pharmacy and two officers of the San Francisco Police Department appeared at petitioner's office on August 23, 1963 with a warrant for the arrest of his nurse and placed her under arrest. The officers did not apply for or have a search warrant although they probably had time to get one.

A search of the record before the board and the pleadings and briefs filed in the superior court in the mandamus action fails to reveal the nature of the charge for which the warrant was issued. The parties and the hearing officer appeared to be conversant with the proceedings. When the hearing officer rejected as

a mere observation of counsel the latter's statement that the nurse had been tried and found not guilty, he noted that it was a matter of public record anyhow.[14] Support for the parenthetical clause reading "charging her with unlawfully practicing medicine," which is found in the findings of fact, is first discovered in the opening argument of the counsel for petitioner in the mandamus proceeding. In the course of that argument he volunteered that the records in question were involved in the trial of the nurse, and that her prosecution grew out of information revealed by telephone conversations between her and a pharmacist which were overheard and recorded by the authorities with the permission of the latter.

The officers asked the nurse at the time of her arrest where the records were of the patients who had received authorization for Methedrine during the period of petitioner's absence. She indicated some which were loose on top of a desk adjoining hers, said that was part of them and that the others were in a metal filing cabinet on a shelf lower down. According to the nurse, they just came in, arrested her, took the records and a list of Methedrine patients, which she had prepared

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[14]Records of the Municipal Court in the City and County of San Francisco reflect that a complaint, No. G 48695, was filed therein on August 24, 1962 charging one bearing the initial of the given name and the surname of the nurse with violation of section 2141 of the Business and Professions Code (prescribing without having a certificate so to do) during the period between August 10 and 22, 1962, and that on March 1, 1963, following trial by the court, the defendant was found not guilty pursuant to the conclusions set forth in a memorandum decision filed that day which reflects that the charges grew out of prescriptions which the nurse authorized to be refilled in petitioner's absence.

at petitioner's request, out of the office and monitored off all the conversations. She was very upset and shaken and could not recall the questions addressed to her or her answers.

The investigator testified that on the following day and for some time on a couple of occasions during the following week he had occasion to go through the cards that were contained in the metal filing cabinet; that he initialed most, if not all of the records subsequent to the time they were picked up; and that he read all of them that related to people who were using Methedrine.

From the evidence developed in this case it is obvious that the practice of refilling the prescriptions which was followed in petitioner's absence was of questionable legality. Section 2141 of the Business and Professions Code makes it a misdemeanor to prescribe for an ailment, etc., without having at the time of so doing a valid unrevoked certificate to practice medicine. The provisions of section 4036 of that code, which define a prescription, do not include a nurse as among those designated to prescribe or write a prescription; and section 4227 prohibits the furnishing of a dangerous drug without a prescription. It is true that section 4229, which then provided, "No prescription for any dangerous drug may be refilled except upon authorization of the prescriber which may be given orally or at the time of giving the original prescription" was subject to the construction (which was followed by the municipal court in the action against the nurse) that since petitioner could have

originally authorized a refill, and since, at present, he could have orally authorized a refill, it was proper for the nurse to orally authorize a refill pursuant to the instructions given her before his departure. Nevertheless, there was no precedent so construing the statutes, nor does it appear that the authorities knew or had reason to believe that all of the dangerous drugs furnished by authorization of the nurse were for refilled prescriptions. (See Randle v. Cal. State Bd. of Pharmacy, supra, 240 A.C.A. 264, 268-270.)

On the record, therefore, there is nothing to sustain any implication from the trial court's finding that the filing of the complaint and the issuance and execution of a warrant against the nurse was other than bona fide. The arrest being valid the search attendant thereto was lawful. "Defendant unavailingly argues that here the police officers had ample time to procure a search warrant and therefore such warrant was required in order to validate the search and seizure of the incriminating evidence at the time of his arrest. (Trupiano v. United States, 334 U.S. 699, 708 [68 S.Ct. 1229, 92 L.Ed. 1663].) In United States v. Rabinowitz, 339 U.S. 56 [70 S.Ct. 430, 94 L.Ed. 653], it was held that a search of the defendant's premises incident to his lawful arrest at those premises was not unreasonable. In so concluding, the court in the Rabinowitz case further said at page 66: 'To the extent that Trupiano v. United States, 334 U.S. 699 [68 S.Ct. 1229, 92 L.Ed. 1663], requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the

search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable'." (People v. Winston (1956) 46 Cal. 2d 151, 162-163; and see Ker v. California (1963) 374 U.S. 23, 41 and People v. Chapman (1962) 207 Cal. App. 2d 557, 571; Thorp v. Dept. of Alcoholic Bev. Control, supra, 175 Cal. App. 2d 489, 492.)

The instant case differs from People v. Schaumloffel (1959) 53 Cal. 2d 96 and Yonchar v. Superior Court (1961) 193 Cal. App. 2d 135. In each of those cases it was recognized that it was proper to take evidence connected with the offense for which the arrest was made, but a general and exploratory search was made which resulted in the seizure of records not connected with that offense, but which led to other charges. Here the records were designated by the nurse in connection with the charges for which she was arrested. Furthermore, there were other sources from which the names of those to whom prescriptions were issued could be obtained.

Petitioner's contention that it is unlawful to seize his records from his nurse overlooks the undisputed fact that he left her in control of his office and instructed her to use the records in connection with the activities for which she was arrested. There is no constitutional prohibition which precludes using against the principal evidence which has been legally seized from an agent to whom has been entrusted its possession and control. (Marron v. United States (1927) 275 U.S. 192, 198.)

Petitioner also relies on authorities which suggest that "'mere evidence" cannot be the subject of seizure in any event. (Abel v. United States (1960) 362 U.S. 217, 234; Harris v. United States (1947) 331 U.S. 145, 154; and Gouled v. United States (1921) 255 U.S. 298, 309.) The recent case of People v. Thayer (1965) 63 A.C. 664 reviews the foregoing cases and concludes: "We hold that the mere evidence rule is not a constitutional standard and has no application in California." (63 A.C. at p. 671.) The remaining conclusions of the court are also pertinent here: "Even if the mere evidence rule were a constitutional standard, it would not require the exclusion of Dr. Thayer's medical care records, for they were the instruments of crime. The employees testified that they used the records to draw up the fraudulent statements. In some cases Dr. Thayer placed wavy lines on the records to indicate that false billings were to be made. Under the circumstances, these records were more instrumental in the commission of the crime than were the utility bills and ledger in Marron v. United States, supra, 275 U.S. 192, and the code books in Abel v. United States, supra, 362 U.S. 217. (See also Matthews v. Correa (2d Cir. 1943) 135 F.2d 534; Landau v. United States Attorney (2d Cir. 1946) 82 F. 2d 285, cert. den. 298 U.S. 665 [56 S.Ct. 747, 80 L.Ed. 1389].) Finally, it should be noted that there are some opinions that construe Gouled v. United States to protect privacy by preserving private papers, such as a personal diary, from any seizure. (Davis v. United States (1946) 328 U.S. 582, 595 [66

S.Ct. 1256, 90 L.Ed. 1453] [Frankfurter, J., dissenting]; United States v. Boyette (4th Cir. 1961) 299 F. 2d 92; United States v. Stern (D.C.S.D.N.Y. 1964) 225 F.Supp. 187.) This construction is contrary to the opinion of the court in Gouled, but even if there is such a rule, it would not prevent the seizure of business files such as the medical records in this case, which were freely open to the doctor's numerous employees. That business records are not constitutionally protected from properly authorized searches and seizures is indicated not only by Marron v. United States, supra, 275 U.S. 192, and Zap v. United States, supra, 328 U.S. 624, but also by the doctrine that records that are required by law to be kept are not protected by the privilege against self-incrimination. (Shapiro v. United States (1948) 335 U.S. 1 [68 S. Ct. 1375, 92 L.Ed. 1787].)" (*Id.*, pp. 671-672.)

The documents seized at the time of the arrest of the nurse were not received in evidence at the hearing

If it be assumed the records were unlawfully seized, the fact remains that they were apparently in the possession of petitioner at the time of the hearing when they were produced pursuant to subpoena. The board asserts that petitioner failed to object to the admission of evidence upon the grounds now asserted. The record, however, shows that the point was in fact raised.

The first suggestion of unlawful search or seizure was made in the course of the original argument on privilege as an objection to reference to or the admis-

sion in evidence of petitioner's patient record cards. Counsel for petitioner stated: "the other violation based on the basic rights of the individual is the manner in which they got the records . . ." and again "if you called somebody who illegally went in there and got those records, I'm sure you'd also have some other objections from me which I haven't yet reached."

When the nurse was interrogated concerning a list of Methedrine patients she had prepared counsel stated: "I'll tell you in advance I've got an objection to your introducing that list . . . I want to know how you got the list . . . I want to examine Mr. Smith on voir dire before we go into this. They walked in there, you know, . . . we need a search warrant in this country." Argument proceeded without permitting petitioner to show the circumstances under which the list and allegedly other records were seized. The hearing officer after alluding to People v. Cahan, supra, 44 Cal. 2d 434, People v. Berger (1955) 44 Cal. 2d 459, and Cooley v. State Bd. of Funeral Directors (1956) 141 Cal. App. 2d 293, concluded that the right to inspect and investigate operations conducted under a license granted by the state rendered the evidence admissible in a disciplinary proceeding.

When the investigator commenced to testify concerning the records taken at the time of the nurse's arrest, petitioner's counsel stated, "I'm going to move it all be stricken unless this man had a search warrant"; and he subsequently so moved.

Finally, in connection with the motion to dismiss it was urged: "My motion that there was an illegal search and seizure . . . should have been sustained." In argument petitioner's counsel also asserted: "Not only were the records so seized inadmissible in evidence against Petitioner—but also any evidence gained by the police through investigations based solely upon the information contained in these records."

A review of the evidence outlined above reflects that all of the patients' record cards were excluded with the exception of three, hereinafter discussed, for which consents were allegedly received from the patients. The investigator who reviewed the seized cards was permitted to testify to their general content. If this was error because of the tainted nature of his source, it was hardly prejudicial because his testimony that the cards reflected the palliative effect of Methedrine was cumulative to other admissions of petitioner which were properly in the record, and, as will be demonstrated, the testimony of petitioner himself.

Some reference, as noted above, was made to the lists of Methedrine patients which also are alleged to have been wrongfully seized. The record reflects that petitioner was not objecting to the admission of the comments written on the lists, and in fact stipulated that the notations could be admitted. The lists themselves, however, were excluded.

The evidence admitted was not the tainted fruit of the documents which had been seized

At the hearing before the superior court, the learned trial judge posed the question: "Suppose . . . from that information they got illegally, they received information which was put into the record, would that make any difference?" He subsequently pinpointed the matter by asking, "Where did they get those patients' names, did they get them as the result of that search; did they get them as the result of legally going into the pharmacy and inspecting their records?" The Attorney General took the position that the record was silent on that question and suggested that they could have been obtained in the latter manner and as a result of petitioner's prior testimony in three cases before the Board of Pharmacy. Petitioner took the position that since the record reflected that the investigator for the State Department of Professional and Vocational Standards had admittedly reviewed all of the records that related to people who were using Methedrine and had taken the list of Methedrine patients which the nurse had prepared, the conclusion that this case, and as well the Board of Pharmacy cases and the prosecution of the nurse all resulted from the seizure of the records was compelled.

The court's decision was expressed at the final hearing on the matter as follows: "I want this case remanded, because, one, in my judgment the records seized as the result of the arrest of the nurse, the records of Dr. Elder, was illegal. Two, the Court holds

that evidence illegally seized cannot be admissible in an administrative proceeding, penal in nature such as this. Three, the case is remanded, that the case will be tried on that theory because it is obvious from this record, the whole record in this case, that this whole matter was tried on the theory that it doesn't make any difference in an administrative proceeding whether evidence is illegally seized or not, that evidence can be used to take away a man's license."

This decision as so expressed and as set forth in the trial court's findings of fact and conclusions of law cannot be reconciled with the record in the case. It has been demonstrated that there are no particular items of evidence which were before the board, and which it should exclude according to the attached mandate of the superior court. On the other hand, if the record in fact revealed that all or a substantial part of the evidence which was introduced was the fruit of an illegal search and seizure, the proceedings for revocation should have been dismissed.

The principle which petitioner apparently contends should be applied is reviewed in People v. Bilderbach (1965) 62 Cal. 2d 757, wherein it is stated: "That the prosecutor may not profit directly or indirectly from an illegal search has been the keystone of the rule including illegally obtained evidence." (62 Cal. 2d at p. 763, and see pp. 763-768.) In Wong Sun v. United States (1963) 371 U.S. 471, upon which *Bilderbach* relies, the opinion recites: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal

actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt 221 (1959)." (371 U.S. at pp. 487-488.) Similarly in Silverthorne Lumber Co. v. United States (1920) 251 U.S. 385, the court struck down an attempt to subpoena records which had been illegally seized, copied and then ordered returned. The opinion states: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." (251 U.S. at p. 392.)

If it be assumed that these rules apply to proceedings of this nature the question resolves itself into a determination of whether the knowledge of the facts is gained from an independent source. In Nardone v. United States (1939) 308 U.S. 338, the court dealt with the mechanics of resolving this question in a case where there had been illegal wire tapping in violation of a Federal statute. The opinion recites: "Sophisticated argument may prove a causal connection between information obtained through illicit wire-tap-

ping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of §605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin. Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. Like mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence in the Government's possession. So to read a Congressional prohibition against the availability of certain evidence would be to subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the

law's officers. Therefore claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury. And if such a claim is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim. The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges." (308 U.S. at pp. 341-342.)

In the instant case there is complete absence of an attempt to prove "that a substantial portion of the case against him was a fruit of the poisonous tree," and no timely steps were taken to exclude the evidence which in fact was presented. The evidence of the names of persons for whom petitioner prescribed was available from a source independent of his records, to wit, the prescription records of the pharmacists. Petitioner made no attempt to show that the use of these records was tainted by the seizure at the time of the arrest, but in fact stipulated, without reserving the objection now urged, that the pharmacists would testify to the prescriptions for those named in the ac-

cusation. The general objection presently asserted was not timely because, as has been set forth, it was not made until all of the evidence, other than the testimony of petitioner, had been adduced.

It is concluded that the record neither specifically nor generally sustains the trial court's findings "that the evidence introduced at the hearing was the result of unlawful search and seizure."

There was no prejudicial error in receiving the patients' waivers and admitting their record cards

The judgment of the trial court in remanding the proceedings to the board not only directed the board to disregard any evidence or information obtained as the result of illegal search and seizures, but also proscribed use of any evidence obtained by misrepresentation. No finding of fact was made in this regard, but the conclusion is apparently predicated upon the statements of counsel for petitioner and an affidavit filed in connection with the petition for writ of mandate.

The issue raised by the petition is stated as follows: "Petitioner was not afforded a fair trial in . . . that during the hearing on June 18 and 19, 1963 agents of the respondent board went to three patients of petitioner; namely, Morris Sisneros, Peter Robert Blonkenfeld and Anthony De Piero and falsely and fraudulently represented to all three patients that they were representing petitioner and that petitioner requested them to authorize the release of their medical records to the respondent and relying on said false

and fraudulent representations did sign the authorizations for the release of said records."

The petition for writ of mandate was filed July 23, 1963 and an alternative writ issued returnable August 19, 1963. The board's return was filed September 10th, and apparently arrangements were made for filing points and authorities with the court. On October 30th, petitioner filed an affidavit of Blonkenfeld which supported the allegations of the petition. No effort was made to present evidence as to the other two individuals from whom waivers of privilege had been secured despite the fact that the final hearing on the petition was not held until January 31st of the following year. Although petitioner attempted to explain his failure to go into the question at the hearing before the board on the grounds that the board desired to finish the hearing, the record does not reflect any request to the board to go into the matter but in fact only an expression of the desire of petitioner's counsel to conclude the proceedings on the second day of the hearings.

The records of the three individuals involved were cumulative in the sense that even if their names were deleted from the category of addicts to whom prescriptions were furnished, there remained a substantial number otherwise so identified. Therefore there was no prejudicial error in the receipt of their record cards.

Since the evidence does not permit findings and conclusions contrary to those made by the board, the alternative writ should be discharged

The question remains as to the disposition to be made of the case. The grounds set forth in the petition include: "The decision is contrary to the evidence and without support in the record." The law prescribes: "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. . . ." (Code Civ. Proc. § 1094.5, subd. (c); and see Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 80; Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 246; and Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 308. Petitioner has not had this review. The contentions which he successfully urged in the points and authorities filed with the trial court were those adopted by it in its judgment. It would appear proper to return the case to that court for a review of the evidence. *Magit,* however, indicates that where the evidence compels findings showing a violation of the provisions of law governing the practice of medicine, and the resulting unprofessional conduct which subjects the licensee to disciplinary action, a judgment of the superior court embodying contrary findings must be reversed. (57 Cal. 2d at pp. 80-87.) Therefore, the evidence in this case must be examined to determine whether there is

in fact a conflict to be independently weighed by the trial court.

The evidence produced by the board has been set forth above. The evidence presented by petitioner consisted of letters of character reference and by his own testimony. The latter is embroidered with a categorical general denial that he ever knowingly or intentionally of wilfully treated a narcotic addict, either in his office or any other place, and specific denials as to each and all of the individuals named as addicts in the other testimony before the board. The whole cloth of his testimony, however, reflects a semantic dispute as to what constitutes an "addict" or "ex-addict". In his initial explanation of what he was trying to do and how he began trying to help "these people," he stated: "I became interested in this about three years ago, when a patient came to me from another doctor who had quit the practice of medicine and in the history he explained to me that he had been a heroin addict and Methedrine in the amount of three ampules a day kept him a member of society, kept him away from heroin and was—he was able to work and carry on his work properly and to stay away from heroin or any of the other narcotics." In describing his procedures he stated, "they'd give me the history of their addiction. Q. And what would you do about that? A. Well, I would determine the length of time that they had been away from narcotics or alcohol or whatever the other drug they had been taking, and then try to determine what dosage of Methedrine or other things—I didn't always stick with Methedrine; that happens to be the

main topic here—and try to rehabilitate these people to get away from—to stay away from their addiction and to become a part of society so they could maintain their jobs and act like human beings." It is obvious from his testimony that he was treating the patients for whom he was prescribing Methedrine, and the treatment was calculated to help the patient from reverting to narcotics.[15]

In discussing whether the patient could become addicted to Methedrine, petitioner expressed himself as follows: "I don't think they can be addicted to Methedrine. Of course the word 'addict' is a very

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[15]"Q. Now, Doctor, did you as a member of the medical profession, did you consider that you were violating the law or ethics of your profession in treating these unfortunates? A. No, sir. Q. Do you believe, Doctor, that you have succeeded in doing some good for these unfortunates? A. I think so. A great many of them. Q. Would you say how much in percentage? Would you say it would be ten percent? Fifteen percent? A. Percentagewise, between 60 and 70 percent of the patients have no record, either criminal or narcotic. They have taken themselves off of heroin and stayed off it. I'm sure many of them will never return to it. They give three reasons. Their first reason, of course, is economic. They can't maintain the habit economically. The second reason is because of stringency of the law and the penalties for being caught in possession or for using it or selling it. It's no longer a crime to be addicts, but it's a crime to procure the methods for being an addict, and these patients that have come to me with a record, either police or narcotic, those individuals are—the great majority of them are sincere in wanting to stay away, and to the best of my ability I don't give these individuals a motive to lie to me. I don't put any restrictions on them except the first visit. In the first visit I tell them I will do what I can to help them, but I feel that every patient or every person must have a certain responsibility for his own illness and part of that responsibility is in obeying the doctor's instructions and being willing to be a little uncomfortable and not reverting to his—I refer to it as the child escape or it's practically a foetal escape of trying to get back on his heroin."

ambiguous term, and it takes a lot of defining. People who—the word means to talk to, the Latin word to talk to something. So any time you talk for something, you can be addicted to it, whether its cigarettes or alcohol or playing golf or taking narcotics. It's a very broad term. It has many definitions, both medical and legal and literary, and it's a term that's pretty hard to pin down." Later he stated: "[A] definition of an addict that I use as a yardstick is anyone that has been on heroin or a narcotic—heroin is a narcotic—or who is a chronic alcoholic or who is chronically addicted to nembutal or any of that type of drug. . . . I think they become an addict when their use becomes compulsive." "An addict is one who is taking, who is at the time taking." He acknowledged: "Well, yes, there's dependency on it. Yes. The chief dependency in many of these individuals is to relieve their craving for narcotics. Q. Now, the craving for narcotics is one, I gather, you recognize to be a continuing one. A. I doubt if anyone ever gets over the craving for narcotics after they have had an established habit. . . . Q. Well, recognizing this craving, Doctor, will you tell us, please, your point of distinction between former addicts and addicts? A. The former addict is an individual who has gone through his withdrawal symptoms and is not at the time—whether it is 10 days or a week or two weeks or one year or two years—is not taking narcotics. And almost all of the narcotics now is heroin and narcotic addicts—Heroin is one after they take heroin they have no desire for any of the other narcotics because of its power and the effect on the mind and

body. Q. And when the patients—at least some of the patients—who are on these Schedules, Appendices A, B and C, gave you the history, they still had a craving for narcotics. Is that correct? A. All of them had a craving."

He further stated: "the reason for prescribing the Methedrine ampules is to relieve the depression that these people go into. One of the chief reasons for a person craving heroin after he's away from it any length of time is he runs into some psychological or emotional or economic problem, and he straightaway has a desire to return to his former habits, to use heroin, particularly, as an escape. And you see it is this great psychological dependency on it that gives him his craving. If we can substitute something that will relieve his depression, and that depression sounds like a fairly innocuous word, but it's one of our great killers. Most of your suicides are predicated on depression, anxiety. Many of our alcoholics are on the same predication, and our insane asylums are full of people who are in depression in order to escape their inability to adjust to their environment, to the social swing."

He explained the prescription for ampules rather than pills as follows: "Well, the reason for that is that during an addict's acquiring and maintaining his habit, he develops a ritualistic fetish for the needle. He becomes needle happy, or they call it 'behind the needle,' and they like the ritual of preparing whatever they're going to take, whether it's Methedrine or a narcotic or distilled water or some of them will

just use a needle just to be using it. It's a type of fetish that they develop, and I'm sure it's more a psychological thing than physical, and I'm sure that the doses of Methedrine tablets could solve their depression as well as the needle, but they prefer the needle, and I don't see what difference it makes how they take it."

He confirmed that he had instructed the nurse to refill the prescriptions in the manner she testified to, after he was unable to find a doctor who would see and prescribe for "these people."

In discussing dosage petitioner stated: "I think that the most effective dose is three ampules a day, the highest effective dose except in a few cases where their heroin addiction was tremendous, and then on four a day. I've had some patients tell me, who have been on a one-hundred-fifty to one-hundred-dollars-a-day habit, that any time a patient takes more than four ampules a day he's looking for extra kicks that he doesn't need, . . . I check it with the family or with somebody else as to how many they are taking a day. I try to talk to members of the family to watch them because the tendency of the drug addict is to overdose in anything they take. If they take aspirin, they'll take half a bottle. They're not content with ordinary doses because their system seems to have developed an affinity for these things. Q. Do you think, then, that in giving these large doses that you are really treating them medically? Or should you, in order to obtain a proper therapeutic response, get the dose down to what is used in normal therapeutics.

A. That's why I try to do. I try to get them down as much as possible, to get them down to five a day, four a day, three a day, two a day and finally get them off of it entirely, and keep them from reverting to going out on the street and buying it or trying to look around for heroin or some other drug to take. I try to figure out for each individual an optimum dosage and then try to work him down, to get him to split the ampule, take only half a one, and some of these—ones that have a real needle fetish, that's fairly easy to do if you let them use a needle. Q. What is the shortest period of time in which you've been able to get them clear off Methedrine? A. I haven't much success with very many of them. It's about three months, three to six months. I'd say three months. Q. And what is the longest period of time you've continued to treat them? A. About three years. Some of them just can't get along without it. They can't work. They're depressed. They'll stay home, lie around the house; they won't get up and around. They start to revert to their narcotic state, if you wish to call it that—or post-narcotic state. It drives them to seeking something to help them."

That the treatment was to substitute the dangerous drug for the narcotic drug is further evidenced by the following: "Q. Would not, then, this be a direct treatment to continue their habituation to some drug or other? A. Well, I think they are going to be habituated to some drug or other, no matter what you do, and if the medical profession turns their back on these people, what are they going to do?"

The following exchange throws further light on the nature of the infirmity for which petitioner was prescribing: "Q. But individually, in this very venturesome area, did you consider that you were really advancing the knowledge of the treatment of addicts? A. Yes, sir. I feel that this method, if other physicians would take this up and help these people and really help them, rather than to make a racket out of it as some doctors have done, give them all they want without any attempt to help them or treat them or any attempt to be friendly with them or work with them—I think that they're lost. There may be some better method developed than Methedrine. I read an article from Seattle that coenzyme that they're using —this probably will answer the physical craving, coenzyme injection, but I doubt if it will help the psychic part. And this illness is certainly a psychosomatic illness. And I've had—I've talked with—during this time I've been in court and talked with different attorneys, and from what information I could get I was doing nothing illegal." As also does the following statement: "An addict that's on his full capacity of his addiction cannot work. He's absolutely no use to himself or society, and he's a burden on his family and society. But if you will give him something that will not injure him in proper dosage, then he has a substitute habit that he can work with, that he can be part of the community with. He can hold a job."

Finally, petitioner gave as his diagnosis of his patients: "Would you care to state what the diagnosis of these patients was? A. Well, the diagnosis depends

on No. 1, the history. If somebody tells me he's been an addict for two or three years ago, I mean that's enough to make a diagnosis on. If, in conjuncation [sic], you can see the evidence on his arm of old or recent needle marks. Q. Exactly. What would you put down as the diagnosis? A. Ex-addiction. Q. Ex-addiction? A. Yes, sir. Former drug addict or addiction, and give the dates as I usually do; heroin 1959 to 1961. That's why I've tried to keep this record, so that it would substantiate a diagnosis. And that's about all it takes, the diagnosis, the history of addiction and seeing needle marks."

The trial court and petitioner's counsel acknowledged that if the evidence was properly before the board, as it is herein found to have been, the license was properly revoked.[16] The crucial question is whether persons treated for depression and a craving for narcotics who are offered Methedrine as a substitute for the narcotic which they crave and who will revert to narcotics if unable to get the Methedrine, are "addicts" or "ex-addicts." The Supreme Court of this state has recently reviewed the meaning of addict as applied for the purpose of commitment (People v. Victor (1965) 62 Cal. 2d 280, 301-305), and as used in a statute prohibiting the operation of a motor vehicle by one addicted to the use of narcotics or cer-

[16]The record reflects: "THE COURT: I don't want you to believe that I think . . . if this evidence was legally in, that they wouldn't have had a right to revoke that license. COUNSEL: I agree with you. THE COURT: Because on the basis of this evidence illegally seized, it shows a course of conduct that well merited the taking-away of the license . . ."

tain dangerous drugs. (People v. O'Neil (1965) 62 Cal. 2d 748, 752-756; and see also People v. Washington (1965) 237 A.C.A. 65, 72-75; People v. Davis (1965) 234 Cal. App. 2d 847, 852; McMurtry v. State Board of Medical Examiners (1960) 180 Cal. 2d 760, 769; and People v. Jaurequi (1956) 142 Cal. App. 2d 556, 561.) The requisites of addiction are said to be (1) emotional dependence on the drug in the sense that the user experiences a compulsive need to continue its use, (2) a tolerance to its effects which leads the user to require larger and more potent doses, and (3) physical dependence so that the user suffers withdrawal symptoms if he is deprived of his dosage. (People v. O'Neil, supra, 62 Cal. 2d at p. 754.) It must be assumed in the instant case that the professional members of the Board of Medical Examiners are as familiar with the literature on the subject of addiction as those who distilled the above test from the material footnoted in their opinions. The petitioner's testimony that he would treat after-withdrawal symptoms and was treating those who had had a habit, and the admission they were ex-addicts supplies the foregoing elements. The question then resolves into one whether the addict is no longer an addict while he is sustained by a substitute drug. It is manifest that he is being treated for something and if it is not his addiction, it is inconceivable what it can be. It is obvious that if the treatment given in this case is countenanced that the prohibitions on prescribing dangerous drugs for narcotic addicts or for treating them outside of designated institutions are meaningless.

Petitioner's statements tend to show that he was proceeding in good faith to give these admitted "ex-addicts" a substitute for their bodies' physical reaction to the termination of the administration of narcotic drugs in the belief that he was restoring them to a useful place in society. There is also evidence which tends to show that he was capitalizing from the unfortunates' need for a palliative for their habit by charging for prescriptions and refills with a minimum, if any, physical examination or attempt to test and reduce the dosage. It is not for this court to determine whether or not he was a Dr. Dooley or Dr. Schweitzer for the addicted denizens of the pavement jungle, or whether there are better methods of treating narcotic addicts than those which are provided by law. By his own admissions he has set up a course of treatment for those who admittedly have all the characteristics of addicts as defined in law and medicine.

Since the evidence in the record admits of only the findings and conclusions arrived at by the board they must be sustained.

The judgment is reversed with directions to the trial court to deny the petition and to discharge the alternative writ.

Sims, J.

We Concur:
Sullivan, P. J.
Molinari, J.

Filed March 31, 1966,
Lawrence R. Elkington, Clerk.

Appendix 4

I.

THE RIGHT TO PRACTICE MEDICINE IS A VALUABLE PROPERTY RIGHT WHICH SHOULD NOT BE DENIED IN A MANNER OR FOR REASONS WHICH CONTRAVENE THE DUE PROCESS PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Schware v. Board of Bar Examiners, 353 U. S. 232, 1 L. Ed. 2d 796;

Section 1094.5(b) *Code of Civil Procedure;*

Moran v. Board of Medical Examiners, 32 C. 2d 395, 399;

Magit v. Board of Medical Examiners, 57 C. 2d 74, 87;

Martin v. Alcoholic Beverage, etc. Appeals Board, 52 C. 2d 287, 293;

Bonham v. McConnell, 45 C. 2d 304, 306.

In *People v. One 1960 Cadillac Coupe,* 62 C. 2d 92, 96, this Court had this to say:

> "The People also contend that, conceding the unlawfulness of the seizure, the exclusionary rule should not be applied in a car forfeiture case, as the action is civil in nature. Whatever the label which may be attached to the proceeding, it is apparent that the purpose of the forfeiture is deterrent in nature and that there is a close identity to the aims and objective of criminal law enforcement. On policy the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property (See People v. Cahan, 44 C. 2d 434, 445 [282 P. 2d 905; 50 A.L.R. 2d 513].)"

While the language just above quoted is most appropriate here where the right to practice medicine, undoubtedly a valuable property right, is involved, the case did not arise from an administrative hearing.

The District Court of Appeal in the case at bar *"assumes"* that the exclusionary rule applies to an administrative hearing where the proceeding contemplates the deprivation of the license to practice medicine (241 A.C.A. 343, 357-358).

It would appear that the resolution of this important question should be decided by this court and not left to the "assumption" of a District Court of Appeal.

In *Administrative Law Treatise* (1958) by Kenneth Culp Davis in Chapter 3, at page 56 of the 1965 Supplement, it is stated:

> "The following cases are merely background for the *law of administrative investigation.* The four categories are (1) Searches and Seizures, (2) Self-incrimination, (3) relevance to authority, and (4) right to counsel." (Emphasis ours).

See,

Rogge, *Inquisitions by Officials: A study of Due Process Requirements in Administrative Investigations;*
47 *Minn. L. Rev.* 939 (1963);
48 *Minn. L. Rev.* 557, 1081 (1964).

The Law Review articles just above cited show clearly the necessity for judicial due process at the administrative level. It will be seen that over the years the tendency has been to accord an individual increasingly more of his constitutionally protected rights.

II.

THE DISTRICT COURT OF APPEAL "ASSUMING" THAT THE EXCLUSIONARY RULE WOULD APPLY AT THE ADMINISTRATIVE LEVEL THEN CAME TO THE CONCLUSION THAT THE RECORD DID NOT SHOW AN UNLAWFUL SEARCH AND SEIZURE OF DR. ELDER'S RECORDS. (241 ACA 343, 358.)

In *People v. Thayer,* 63 A.C. 664 (Cert. Den. April 18, 1965), this Court thoroughly discussed, interpreted and distinguished the United States Supreme Court decisions relating to the seizure of evidentiary matter.

In *Thayer,* however, the records seized were *business records* as distinguished from *confidential treatment records* such as are here involved, and the seizure was accomplished by the means of a search warrant.

The Records taken from Dr. Elder's office without a search warrant were not mere business records, but records of matters clearly within the patient-physician relationship. They were also not records required by law to be kept, but were for the benefit of the patients as an aid to the doctor in caring for them.

The District Court of Appeal holds that the search and seizure of Dr. Elder's records was not illegal because it was an incident of a valid arrest of Miss Roussell.

Assuming that Miss Roussell's arrest was valid, it cannot be denied that the search was of Dr. Elder's office and the seizure was of his confidential records. If an employer's records can be seized as an incident to the arrest of an employee, then all constitutional safeguards have been abrogated.

The District Court of Appeal's opinion states that Dr. Elder left Miss Roussell in "control of his office and instructed her to use the records in connection with the activities for which she was arrested." (241 A.C.A. 343, 361.) This statement should be compared with the one wherein it was said "a search of the record before the Board and the pleadings and papers filed in the Superior Court in the Mandamus action fails to reveal the nature of the charge for which the warrant issued."

The record shows without contradiction that Miss Roussell's authority to use the records was strictly limited to previous instructions given her by Dr. Elder in order that his patients might be benefited during his absence. She was not authorized to consent to a search of his premises and a seizure of his records.

This Court should not permit the District Court of Appeal to set forth so dangerous a precedent. Under its holding, no person's records, confidential or otherwise, will be safe. No person's privacy will be respected. Our Code (§ 1985 *Code of Civil Procedure*, Subdivisions (1), (2), (3), (4) and (5)) sets forth in minute and precise detail the safeguards surrounding the issuance of a subpoena *duces tecum*. It was obviously the legislative intent that no papers or documents could be required without an affidavit showing good cause, an exact specification of the matters or things sought to be produced, and a fully detailed statement concerning the reason for the production.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 464

HARRY M. ELDER, M.D.,
Petitioner,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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INTRODUCTION

The petitioner is most neglectful of the facts of record herein and is likewise persistent in attempting to avoid the careful and meticulous written opinion of the District Court of Appeal, State of California, First Appellate District, Division One, which opinion he seeks to have reviewed by this Honorable Court.

Said latter opinion read in its entirety and in proper context will present a satisfactory answer to all the purported points raised by petitioner. Supplementing such opinion, of course, are the facts of record which are too lengthy to be completely related in said opinion of the District Court of Appeal.

Said facts of record are reflected initially and primarily in the transcripts of the hearings held before the administrative agency itself, viz., the Board of Medical Examiners of the State of California.

Petitioner for writ of certiorari has not fulfilled his duty in filing or ordering or having sent up to this Honorable Court this key portion of the record. (Rule 21 (1) of the Rules of the Supreme Court of the United States)

It will be noted, however, that the opinion of the District Court of Appeal quotes directly and liberally from the administrative transcript. Likewise, the instant brief in opposition will set forth necessary portions of the administrative transcript. Unless otherwise noted, all references to the transcript will be that of the administrative record made before the Board of Medical Examiners.

Again, preliminarily, it should be noted that petitioner has not fulfilled the considerations governing Review on Certiorari as dictated by Rule 19 1(a) of the Rules of the Supreme Court of the United States.

Neither has petitioner complied with Rule 23 1(f) of said Rules of the Supreme Court of the United States, viz., he has not specified either the stage at which or the manner in which his purported federal questions were raised in the proceedings below. Indeed, petitioner's hesitancy in this respect may be occasioned by a review of Appendix 4 of Petition for Writ of Certiorari. Said Appendix 4 comprising a petition to the California Supreme Court indicates that Doctor Elder only raised the Due Process Clause of the 14th Amendment and in an amorphous manner.

The vagueness of petitioner's constitutional arguments throughout the entirety of these proceedings was commented upon by the District Court of Appeal as follows:

> "Petitioner in support of the trial court's judgment has refused to accept the board's challenge to point out

the particulars in which his rights were violated or the specific evidence which resulted therefrom. He has contented himself with a general statement of constitutional principles to establish that his license cannot be revoked without due process of law, that the use of records obtained by an illegal search and seizure would be a violation of his rights, and that in any event mere evidence cannot be seized in connection with an arrest." (Appendix 3 of the Petition for Writ of Certiorari, page 12.)

In light of the above, the main thrust of the instant brief will be to pinpoint the errors in the Petition for Writ of Certiorari, leaving the opinion of the District Court of Appeal and the facts of record to speak for themselves.

QUESTIONS PRESENTED

As presented in the Petition for Writ of Certiorari (at page 3) the key to petitioner's approach is really in his Question 1 which propounds:

> "1. Whether the arrest of a nurse on a warrant for her arrest rendered lawful the search and seizure of the confidential records of her employer doctor where there has been no search warrant issued therefor and where the sole purpose of the warrant of arrest of the nurse was to search and seize the confidential records of the doctor."

The sophistry of this purported question is apparent from several aspects:

1. The records of the doctor were not confidential.
2. The absence of a search warrant is of no moment in view of the lawful arrest.
3. Based upon Dr. Elder's objections grounded upon a statute peculiar to Civil Law (viz. the Doctor—Patient privilege CCP 1881 (4)) his records were not received in evidence.